(27,310)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 555.

SOUTHERN IOWA ELECTRIC COMPANY, APPELLANT,

vs.

THE CITY OF CHARITON, IOWA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Caption	*a*	1
Citation	1	1
Service of citation	3	2
Bill of complaint	5	3
Exhibit "A"—City ordinance	22	14
Exhibit "B"—Findings of board of conciliation	26	18
Memorandum by Wade, *J*	28	19
Order fixing time of hearing	29	20
Order for temporary injunction	31	20
Bond for temporary injunction	33	21
Answer of defendants	38	24
Exhibit 1—Proposition of Edwin B. Perrigo	43	27
Exhibit 2—Letter of Southern Iowa Electric Co., dated November 15, 1918	47	32
Order granting leave to amend bill of complaint	49	34
Amendment to bill of complaint	51	35
Exhibit "A"—Agreement	63	42

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INDEX.

	Original.	Print.
Memorandum opinion by Wade, J	66	45
Order granting leave to file amended and substituted answer	75	51
Amended and substituted answer	77	52
Exhibit 1—Agreement	94	63
Exhibit 2—Letter of Southern Iowa Electric Co., dated November 15, 1918	96	65
Order fixing time for hearing	98	67
Memorandum and decree	99	67
Application for continuance of restraining order	104	70
Petition for appeal	109	72
Assignment of errors	112	73
Order allowing appeal	118	76
Order continuing restraining order	120	77
Bond for continuance of restraining order	123	78
Bond on appeal	128	80
Præcipe for transcript	132	82
Clerk's certificate to transcript	135	84

a Pleas and proceedings before the Honorable Martin J. Wade, Judge of the District Court of the United States for the Southern District of Iowa, in a certain cause lately pending in the Southern Division of said Court at Creston, Iowa, being numbered 4010, Equity, wherein Southern Iowa Electric Company is Complainant and The Town of Chariton, Iowa, et al. are defendants.

Appearances:

Tinley, Mitchell, Pryor & Ross, Council Bluffs, Iowa, Attorneys for Complainant.
J. W. Kridelbaugh, Chariton, Ia., Attorney for Defendants.

Wm. C. McArthur, Clerk, P. O. Des Moines, Iowa.

1 In the District Court of the United States, Southern District of Iowa, Southern Division.

In Equity.

4010, Eq.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA; H. G. LARIMER, Mayor and J. M. Kneeland, E. C. P. Connell, R. J. Yengel, W. F. Kull and O. E. Lamb, as Members of the City Council of the City of Chariton, Iowa, Defendants.

Citation on Appeal.

Filed Sept. 15, 1919. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

UNITED STATES OF AMERICA, ss:

To the City of Chariton, Iowa; H. G. Larimer, Mayor, and J. M. Kneeland, E. C. P. Connell, R. J. Yengel, W. F. Kull, and O. E. Lamb, as Members of the City Council of the City of Chariton, Iowa, and to Joseph W. Kridelbaugh, Attorney of Record for Above Named Defendants:

You and each of you are hereby cited and admonished to be and appear *to* the Supreme Court of the United States to be held in the City of Washington in the District of Columbia on the 3rd day of October, A. D. 1919, pursuant to an order allowing an appeal,

filed and entered in the Clerk's office of the District Court of the United States for the Southern District of Iowa, from a final decree signed, filed and entered on the 25th day of June, 1919, in that said suit being in equity number 4010 wherein the Southern Iowa Electric Company is plaintiff and you are defendants and appellees, to

2 show cause, if any there be, why the decree rendered against the said appellant as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Martin J. Wade, United States District Judge, for the Southern District of Iowa, this 3d day of September, 1919, and of the Independence of the United States, 144th.

MARTIN J. WADE,
United States District Judge for the Southern District of Iowa.

3 STATE OF IOWA,
Lucas County, ss:

I, C. C. Lyman, being first duly sworn upon oath say that I am the duly elected, qualified and acting sheriff of Lucas County, Iowa; that the within and attached Citation on Appeal came into my hands on the 11 day of September 1919 and I duly served the same by offering to read the same to each of the defendants hereinafter named and each waiving the reading, and delivering to each a true copy thereof, as follows, towit: The City of Chariton, Iowa, by service upon W. M. Householder, city Clerk of said City; H. G. Larimer, named as Mayor, also Geo. Routt, Mayor succeeding H. G. Larimer, also J. M. Kneeland, J. P. Connell, R. J. Yengel, W. F. Kull and O. E. Lamb, named as members of the City Council of the City of Chariton and upon Frank Dunshee, Fred Yengel, Alf. Simmons, O. E. Lamb having removed his residence from the State of Iowa and his residence unknown, 66 members of the City Council of the city of Chariton, Iowa, succeeding C. P. Connell, R. J. Yengel, J. M. Kneeland as such members; that the service of such Citation on Appeal was so made by me upon each of the above named defendants on the 11 and 13 day- of September *day of September* 1919; that Joseph W. Kridlebaugh, Counsel for defendants and City Attorney for the city of Chariton is absent from the State.

C. C. LYMAN.

Subscribed in my presence and sworn to before me by the said C. C. Lyman this 13th day of September 1919.

[Seal of the District Court, Lucas Co., Iowa.]

GEO. A. VERNER,
Clerk of the Dist. Court.

4 Be it remembered that on the 5th day of November 1918 there was filed in cause No. 4010, Equity Southern Division, Southern Iowa Electric Company vs. The Town of Chariton, Iowa,

et al. a Bill of Complaint which is in words and figures as follows to-wit:

5 In the District Court of the United States, Southern District, Southern Division.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA, and H. G. LARIMER, as Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yenger and W. F. Kull, as Members of the City Council of the City of Chariton, Iowa, Defendants.

Bill of Complaint.

Filed November 5, 1918. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

To the Honorable Judge of the District Court of the United States for the Southern District of Iowa:

The plaintiff, Southern Iowa Electric Company, brings this its Bill of Complaint against the City of Chariton and H. G. Larimer as Mayor and J. M. Kneeland, J. P. Connell, R. J. Yengel and W. F. Kull, as members of the City Council of the City of Chariton, and complains.

I.

The plaintiff, Southern Iowa Electric Company, is a corporation organized and existing under the laws of the State of Delaware and is a resident and citizen of the State of Delaware.

II.

The defendant, City of Chariton, is a municipal corporation of the State of Iowa, and created as such by the Legislature of the State of Iowa, and pursuant to an act made thereby and under authority of the Constitution of the State of Iowa. The defendant, H. G. Larimer is the duly elected, qualified and acting mayor of said city and the defendants, J. M. Kneeland, J. P. Connell, R. J. Yengel and W. F. Kull are the duly elected, qualified and acting members of the City Council of said city of Chariton and together constitute the City Council of said City; that each of said defendants is a resident and citizen of the State of Iowa.

6 III.

The amount involved in this controversy exceeds the sum of Three Thousand ($3,000.00) Dollars exclusive of interests and costs and the controversy arises under and involves a construction and application of the provisions of the Constitution of the United States, to-wit,

those provisions of the Constitution of the United States prohibiting the taking of the plaintiff's property for public use without just compensation, to-wit, the fifth and fourteenth amendments to the Constitution, those prohibiting the taking of property of plaintiff without due process of law, to-wit, the fifth and fourteenth amendments to the constitution, and those guaranteeing to plaintiff equal protection of the law, to-wit, the fourteenth amendment to the Constitution.

IV.

The plaintiff further complaining of the defendants and each of them alleges that it is a corporation organized and existing as aforesaid, owning and operating the business of supplying in the City of Chariton, Iowa, electric current for the lighting of the streets and public places and the furnishing of power for public uses, also furnishing electric current for private and commercial uses, for lighting and power purposes, to the citizens of Chariton, Iowa, and the public generally; that the plaintiff in carrying on said business owns, operates and maintains a well equipped and modern plant for generating electrical energy in the City of Chariton and transmission lines in and along the streets, avenues and public places of said city, comprising poles, wires, transformers and other fixtures and which said transmission lines cover said city for the convenient and economical connection with lighting and power fixtures and equipment of all users within the limits of said city.

That the plaintiff owns and operates its said generating plant and that the same is of sufficient capacity to furnish, not only the electrical energy required for lighting and power purposes within said city of Chariton, but sufficient to supply the demands for other cities for public purposes and for commercial and private uses; that

7 the plaintiff is the owner of a transmission line for the carrying of electrical energy, to and into the cities of Osceola, Lucas, Woodburn, Lacona, Russell and Murray, together with transmission lines along the streets, avenues and public places of all of said cities so constructed as to furnish electrical energy for the public uses of said cities for lighting and power purposes and for all of the inhabitants of said cities; that all of said cities are in close proximity to each other and so situated that the furnishing of electrical energy for their uses, generated at a common plant provides a greater economy than could be provided by a separate plant for each city; that plaintiff in the construction, maintenance and operation of said transmission lines and in the furnishing of electric current for lighting and power purposes is carrying on its business in each of said cities pursuant to authority granted unto it in the manner provided by law and likewise is maintaining and operating its lines of transmission between said cities pursuant to authority granted to it under the laws of the State of Iowa.

V.

The defendant, City of Chariton, by ordinance regularly passed by its City Council and approved by its Mayor upon the consent of the electors of said city being first had in the manner provided by law granted unto one Edwin B. Perrigo and his assigns power and authority to construct, maintain and operate transmission lines in and along the streets, avenues and public places of said city and to construct, maintain and operate its line of poles with wires and other conductors, fixtures and appliances necessary and proper for the transmission of electric current along and over the streets, avenues and public places of said city and furnishing electric current for power and lighting purposes to said city and all of the inhabitants thereof; that said ordinance was so adopted by said city on or about the 21st day of September 1914, and thereafter, to-wit, within thirty (30) days was by the said Edwin B. Perrigo regularly assigned to this plaintiff; that he, the said Edwin B. Perrigo, assigned and transferred to this plaintiff all of the rights vested in him under
8 said ordinance. Hereto attached is a copy of said ordinance, marked "Exhibit A" and made a part of this petition; that at the time of the passage of said ordinance as hereinbefore alleged and the assignment thereof to this plaintiff, the plaintiff paid to the defendant, City of Chariton, the sum of Sixty-Five Thousand Dollars ($65,000.00) as the purchase price of its electric plant comprising its generating plant and transmission lines, fixtures and equipment; that immediately thereafter the plaintiff entered into the possession of said plant and commenced operation thereof, carrying on the business of generating electrical energy and furnishing the same for lighting and power purposes; that in accordance with the terms of said contract with the city of Chariton the plaintiff immediately commenced the construction of a new generating system and the rebuilding of the distribution system at a total cost of Ninety-five Thousand Nine Hundred Eighty-eight and 15/100 ($95,988.15) Dollars, and has since carried on the business of generating electric current and furnishing the same for lighting and power purposes in the City of Chariton as well as the other cities hereinbefore named.

VI.

That at the time of the adoption of said ordinance by the City of Chariton as hereinbefore alleged the said City of Chariton was vested with the power by delegation thereof in the manner provided by law to regulate and fix the rates to be charged to all consumers of electric energy for light and power purposes within the corporate limits of the city furnished by any one engaged in the operation of any such business; that such power so vested in the City of Chariton was a continuing power imposing the duty upon said city to fix and regulate the rents and rates to be charged by the furnisher of electrical energy and to be so fixed at such an amount and rate as should be just, giving to the furnisher a sufficient return to meet all expense

9 and a reasonable profit compensating as interest upon invested capital represented by the value of the equipment necessarily used and useful in the carrying on of said business; that the said City of Chariton in the exercise of said power and conforming to the duty imposed upon it by the Laws of the State of Iowa fixed the rates and rents to be charged by the furnisher of electrical current to all users within the city of Chariton including the same in said ordinance as Section 3, which is as follows:

Section 3. The grantee shall sell current at rates not to exceed for monthly consumption those named in the following schedules:

Lighting Rates.

1 to 50 K. W. H., 12 cents per K. W. H.
51 to 150 K. W. H., 11 cents per K. W. H.
151 to 300 K. W. H., 9 cents per K. W. H.
301 K. W. H., and over, 8 cents per K. W. H.

Power Rates.

Up to 100 K. W. H., 9 cents per K. W. H.
101 K. W. H., and up to 300 K. W. H., 8 cents per K. W. H.
301 K. W. H., and up to 500 K. W. H., 7 cents per K. W. H.
501 K. W. H., and up to 800 K. W. H., 6 cents per K. W. H.
801 K. W. H., and up to 1000 K. W. H., 5 cents per K. W. H.
Over 1000 K. W. H., Special contract.
Power rates to apply on motors above two horsepower.
Meters shall be read monthly and charges made therefor; and a minimum charge of seventy-five cents per month shall be made for each meter connected where readings at the prevailing rates do not equal said sum.
No meter rent shall be charged.

Street Lighting Rates.

Overhead suspended hooded incandescent street lamps:
For 60 candle power lamps or their equivalent, each per annum, $15.00.
For 80 candle power lamps or their equivalent, each per annum, $18.00.
Lamps to be lighted from dusk to dawn each night.
Payment for same to be made in twelve equal monthly installments.
The grantee shall at all times furnish and maintain said lamps.
For five lamp cluster posts, as now installed, each having one top lamp or 80 candle power, to be lighted from dusk to dawn each night, and four bottom lamps, each of approximately 45 candle power, to be lighted from dusk to eleven o'clock P. M., each night or the equivalent of the above in candle power, each post per annum $36.00.

Payment for same to be made in twelve equal monthly installments.

The grantee shall furnish lamp and globe renewals for said cluster posts.

Pumping Rates.

Per kilowatt hour on meter at pumping station, 4 cents. This rate to include operating care of pump motor or motors and pumps. The city to pay for supplies and repairs.

10 That at the time of the adoption of said ordinance and the fixing of the rates to be charged by the furnisher of electric current users thereof within the city of Chariton, acting under the authority granted by said ordinance, the said City of Chariton found and determined the rates to be charged were such rates as taking into consideration the value of the equipment necessary for the carrying on of said business reconstructed in the manner required by the contract with said city and taking into consideration also the costs of essential material and labor required for the prosecution of said business and the amount of business then existing and obtainable would produce a revenue sufficient to pay the costs of operation of the plant and the furnishing of the service and a reasonable return as interest compensation upon capital invested, representing the cost and value of the property necessary for the carrying on of said business; that said city council determined said rates as being only sufficient to produce such a revenue and that in truth and in fact the rates so established were correct and could not produce a profit in excess of the cost of operation including compensation for depreciation of property and including also a reasonable interest upon necessary capital invested in the property essential for the furnishing of the service required; that the plaintiff in carrying on its business acquired under said rates only a sufficient income to compensate it for the cost of operation of business, including expense of labor and material essential to the carrying on of the business and compensation for depreciation of its property by use and a reasonable profit to compensate as interest upon invested capital essential for the acquisition of the essential equipment for rendering the service required; that said city council likewise took into consideration the fact that the equipment of the generating plant was larger than required for furnishing service to users within the city of Chariton and was sufficiently large to furnish service to the cities hereinbefore named and designed for such purpose and that in the furnishing of such service to such other cities rates would be charged based upon the same considerations; that in truth and in fact the rates
11 established by said ordinance were sufficient to furnish the returns hereinbefore referred to based upon such considerations.

VII.

Plaintiff further states that its capital invested in its said plant and transmission lines and its equipment all of which is necessary and used for the generating of electric current, and all of which is required for the convenient, suitable and economical supplying of electric current, aggregates the sum of Three Hundred Thirty Thousand Two Hundred Ninety-Eight and 66/100 ($330,298.66); that such values comprises its plant as hereinbefore referred to and its entire transmission line and all of the properties used by it for the furnishing of light and power in all of the cities hereinbefore referred to; that such valuation does not include properties that have become obsolete or that are not used or that are not useful and necessary in the carrying on of said business; that such values are based upon the reasonable value of the property and reproductive cost thereof, eliminating franchise value, going concern value and all matters aside from actual cost of equipment based upon normal prices of pre-war period.

That at the time of the adoption of said ordinance and the fixing of the rates hereinbefore referred to the rates established by ordinance for the light service in the city of Osceola permitted a charge of 20¢ per Kilowatt with a discount of 20% to all consumers using more than 25 Kilowatts per calendar month, and a discount of 33-1/3% for all using more than 25 Kilowatt- per calendar month. and a discount of 50% for all using in excess of 50 Kilowatts per calendar month; that such rates continued to be in force in the City of Osceola, Iowa, until on or about the 27th day of June, 1916, when the same were amended to substantially the same rates provided by Section 3 above quoted; that since the adoption of the ordinance above referred to fixing the rates as set forth in Section 3
12 above quoted in the City of Chariton, the plaintiff in carrying on its business through all other towns hereinbefore named excepting the Cities of Chariton and Osceola, charged and received for its service rates equal to and in excess of the rates established by said Section 3 above quoted; that the revenue derived by plaintiff from all sources under said rates prior to the extraordinary conditions hereinafter referred to were only sufficient to meet the actual expense of rendering the service including cost of labor and material, depreciation and other necessary expense and a reasonable return upon necessary capital invested in strictly essential equipment.

VIII.

Plaintiff further shows the court that since the existence of a state of war, to wit, since April, 1917, the cost of maintaining and operating the business of plaintiff and rendering the service required of the plaintiff that its expense has been greatly increased; that the cost of labor and material required for the operation of said business has increased from fifty to two hundred per cent; that such increase is abnormal and due to the extraordinary situations of the

world and the demand growing out of the necessities of war for man power and material; that the necessities of war have required the government to exact the service of men, withdrawing from the fields of labor several millions of men, thereby increasing the necessary wage scale; that the demands of the government for materials of all kinds for its uses in a foreign country necessary in the prosecution of the war and for uses of other nations allied with the government has greatly reduced the supply for the home market and resulted in a great and extraordinary enhancement of costs; that such condition is extraordinary and was not within the contemplation of the parties, to wit, this plaintiff and the defendant- at the time the defendants established the rates hereinbefore referred to and at the time the plaintiff entered upon the operation of the business
13 hereinbefore referred to; that such situation arises through causes beyond the control of this government or any agency thereof or this plaintiff, and arose through acts of lawlessness and violence of such a nature as to have been beyond *his* conception at the time of the adoption of the ordinance hereinbefore referred to; that the conditions extraordinary in character as hereinbefore alleged necessarily inhere in a state of war of world wide magnitude; that such conditions have imposed increased burdens upon all business requiring all departments of government to exact larger sums in taxes and thereby greatly increasing the business expense of this plaintiff; that because of these extraordinary conditions the returns of plaintiff from the operation of its business have been insufficient to meet its actual expense; that its actual expense for the year 1917 amounted to the total sum of Sixty-nine Thousand Seven Hundred Sixty-Three and 4/100 ($69,763.04) Dollars and which sum includes only the items of expense of operation including labor, materials and management and the expense of taxes and of depreciation of property and interest on bonds and notes representing borrowed money, which said interest charge aggregated the sum of Eighteen Thousand Four Hundred Sixty-Five ($18,465.00) Dollars; that the income of plaintiff from all sources during said year 1917 was Two Thousand Forty-Two and 37/100 ($2,042.37) Dollars, less than sufficient to pay its said expense; that for the first six months of 1918 including only the same items of expense, the loss of plaintiff was Three Thousand Seven Hundred Forty-Five and 47/100 ($3,745.47) Dollars; that such expenses have increased during the latter part of this year and the total loss of plaintiff for the year 1918 will approximate the sum of Fifteen Thousand Dollars; that such losses do not include the loss of plaintiff based upon a reasonable interest returned upon capital invested aside from capital borrowed, and does not include a reasonable return upon the value of the property as a going concern and the capital invested in the creation of business.

14

IX.

The plaintiff further shows the court that repeatedly since the arising of the extraordinary conditions hereinbefore alleged it has

fully and fairly presented with exactness and precision the question of the inadequacy of the rates as set forth in Section 3 above referred to to the *plaintiff*, and has urged the defendants to exercise the power granted unto it by the Laws of the State of Iowa, to regulate the rates to be charged by it and to establish such a rate as would meet the necessary expense in supplying the users of electric current in the City of Chariton and give to plaintiff a sufficient revenue to meet such expense, including interest upon borrowed capital, that the plaintiff likewise has continually presented the same showing, accompanied by a similar request, to the City of Osceola, and is now charging and receiving from the other cities hereinbefore alleged such a rate as, if applied likewise in the cities of Osceola and Chariton, would give to plaintiff a sufficient return to avoid the losses hereinbefore referred to; that notwithstanding plaintiff's frequent requests the defendants have failed and refused to regulate said rates and to establish rates that will compensate as hereinbefore alleged; that the said defendants claim a continuing contract fixing maximum rates to be charged.

X.

Plaintiff further alleges that in the month of July, 1918, the owners and operators of properties similar to those operated by this plaintiff, to wit, the owners and operators of public utilities of the State of Iowa, assembled with the representatives of municipalities in the State of Iowa with a view of meeting the extraordinary situations arising out of the war and for the purpose of avoiding losses that might occur and injuries to the owners of properties of such
15 character and with a view of avoiding the threatened calamity of bankruptcy of such institutions throughout the state, appointed five men, disinterested and capable, as a Board of Conciliation, authorizing said board to investigate and pass upon the adequacy and inadequacy of existing rates throughout the State of Iowa; that such Board was formed as a war measure with the view of meeting a duty devolving upon the citizens of Iowa to prevent ruin with its attendant effect upon the spirit of the people; that plaintiff, for the purpose of having determined the justness of its claim, requested the defendants to submit the matter of rates to such a board for arbitration by agreement; that upon the refusal of defendants the plaintiff filed an application with said Board of Conciliation requesting said Board to examine into the question of rates and the necessary amount thereof required to compensate plaintiff for the service rendered and a copy of said application was mailed to the defendants and the defendants notified to appear before said Board of Conciliation, but that defendants declined to appear; that thereafter the plaintiff presented its showing to said Board of Conciliation and said Board of Conciliation, after examining into such question and determining the value of the properties of plaintiff and cost of service, determined and presented a schedule of rates, found to be sufficient and only sufficient to meet the expense of rendering the service here-

inbefore referred to. Hereto attached is a copy of the finding of the Board of Conciliation, marked Exhibit C, and made a part hereof.

XI.

Plaintiff further shows the court that it is not earning sufficient money to pay the cost of operation and interest on its borrowed capital and alleges the fact to be that its said borrowed capital
16 is a lien upon all of its properties and secured by mortgage; that upon default said mortgage provides that the indebtedness secured thereby shall become due and that the mortgage is subject to foreclosure and that a receiver for the property should be appointed; that such expense of interest can only be met by the borrowing of additional capital, thereby increasing capital invested and under the laws of the State of Iowa plaintiff could not exact rates sufficient to furnish an earning power to pay interest upon such invested capital; that under the laws of Iowa the factor of interest allowed in the determination of proper rates can only be upon necessary capital invested in the equipment, to wit, the value of the equipment as a completed property and necessary for the furnishing of the service; that because of this situation additional capital cannot be obtained and default in payment of interest will result and that the same will be followed by great loss and irreparable injury.

XII.

Plaintiff further alleges that under the laws of the State of Iowa the city of Chariton is vested with the power to fix and regulate rates and charged with the duty of fixing such rates for service of the character hereinbefore alleged as shall compensate only as hereinbefore alleged; that such power and duty is a continuing power and a continuing duty and recognizes that with changing conditions rates should likewise be changed; that Section 3 of the ordinance above referred to by reason of the extraordinary conditions hereinbefore alleged has become and is null and void and should be by the court held to be null and void for the reason that the enforcement thereof would result in taking the property of plaintiff for public uses
17 without just compensation and the taking of the plaintiff's property without due process of law and would deny to the plaintiff the equal protection of the law; that the enforcement of said Section 3 of said ordinance would require plaintiff to furnish electric current to the defendant, City of Chariton, and the inhabitants thereof for lighting and power purposes at a rate insufficient to pay the expense of carrying on the business, to-wit, the cost of labor and materials necessarily employed and would fail to give to plaintiff any compensation for invested capital represented by the actual value of the properties necessary for the furnishing of the service; that under the laws of the State of Iowa and under all ordinances of the City of Chariton all others are protected in their property and not subjected to losses resulting from exactions of law; that the business of plaintiff is one of public necessity and essential to life and com-

fort; that a diminution of efficiency in service would be of great and irreparable injury to the public and to all persons; that a failure upon the part of plaintiff to furnish correct and efficient service would result in great and irreparable loss to the defendant city and to all of the inhabitants thereof; that a failure upon plaintiff's part would burden the inhabitants of the City of Chariton with an expense aggregating many thousands of dollars to provide a substitute and that the facilities for substitution are not readily at hand and great injury to the inhabitants would result.

XIII.

The plaintiff shows the court that it has in the City of Chariton a large number of customers, to-wit, approximately 1,150 customers; that the monthly bill of each customer is small; that the defendants and all inhabitants of said City of Chariton assert the validity
18 of said Section 3 and thereby claim that lawful rates are established and that the exaction by plaintiff of any other sum or amount for service rendered would be illegal and payment would be declined; that because of the large number of customers, the enforcement of a higher or compensatory rate would entail an expense, thus greatly increasing the expense account of plaintiff; that in most instances the monthly bill of each customer would be insufficient to pay the cost of collection by court process; that unless rates are collected promptly as they accrue large losses would be incurred in that many customers are financially irresponsible and that people now inhabiting Chariton remove from the city and to a considerable extent the inhabitants of said City change by people moving away and others coming in; that the losses occurring on this account would be large; that plaintiff has no plain, speedy and adequate remedy at law and for the reasons hereinbefore alleged the remedy at law is wholly inadequate.

XIV.

Plaintiff further alleges that since the finding of the Board of Conciliation hereinbefore referred to the plaintiff requested defendants to regulate and fix such rates as would compensate plaintiff for the service required of it and that defendants still refuse and continue to demand compliance by plaintiff with Section 3 of the ordinance above referred to; that the defendants threaten to enforce said ordinance and to advise all inhabitants to refuse to pay rates higher or different from the rates established by said ordinance and that great and irreparable loss will result to plaintiff unless the announced purpose of defendants shall be restrained by the injunctive powers of this court, and that a multiplicity of suits will result and that defendants will carry out their threats unless so prevented by the Court.

19 To the end therefore, that the plaintiff may have the relief which it can obtain only in a court of equity and that the defendants may answer this, the Plaintiff's bill of Complaint, but not under oath, an answer under oath being hereby waived, the plaintiff prays;

1. That a decree of this court shall be entered finding, adjudging and decreeing that Section 3 of the Ordinance of the City of Chariton, a copy of which is attached hereto as "Exhibit A" has become and is null and void because the enforcement thereof will deprive plaintiff of its property without due process of law and would take its property for public use without just compensation and would deprive plaintiff of the equal protection of the law and for each and all of said reasons.

2. That it be further found, adjudged and decreed by the court that plaintiff has no speedy and adequate remedy at law for the injury which would result from the enforcement of said ordinance and the required compliance therewith by plaintiff and that plaintiff would suffer great and irreparable injury.

3. That a writ of injunction shall issue out of this court and under the seal thereof directed to and against the defendants, to-wit, the City of Chariton and the Mayor and members of the city council as named, restraining and enjoining them and each of them and their successors in office and all officers, agents, servants and employes of the city of Chariton, acting for said city or under and by authority of said city or any of the officers thereof named herein or their successors from enforcing or attempting to enforce Section 3 of said ordinance.

20 4. That the plaintiff may be given by this court through its orders and decrees such other and further relief as the court shall deem equitable and just.

5. The plaintiff further prays that a writ of subpœna of the United States of America shall issue out of this honorable court and under the seal thereof directed to the defendants and each of them commanding said defendants and each of them upon a day therein named, to appear and answer this petition of plaintiff, but not under oath, as answer thereto has been waived by plaintiff.

6. That upon the filing of this petition and presentation thereof to the court that a temporary restraining order or provisional injunction be granted restraining and enjoining the said defendants and each of them, their successors, agents and employes from enforcing or attempting to enforce the provisions of Section 3 of the ordinance hereinbefore referred to and that such restraining order shall continue throughout the pendency of this case and the plaintiff will ever pray.

SOUTHERN IOWA ELECTRIC COMPANY,

(Signed) By EMMET TINLEY,
W. E. MITCHELL,
J. C. PRYOR, JR.,
D. L. ROSS,
Counsel for Plaintiff.

TINLEY, MITCHELL, PRYOR & ROSS,
Att'ys for Complainant,
Council Bluffs, Iowa.

21 STATE OF IOWA,
Pottawattamie County, ss:

I, Willis Todd, being first duly sworn upon oath say that I am President of the Southern Iowa Electric Company, the above named corporation, complainant; that said complainant is a corporation organized under the Laws of the State of Iowa; that as President I have charge of the business of the corporation; that I am fully informed as to all of its property and the business carried on by it in different cities in the State of Iowa, and that I have read the foregoing bill of complaint and know the contents thereof and that each and all of the statements therein contained are true in all respects, to the best of my information and belief.

(Signed) WILLIS TODD.

Subscribed in my presence and sworn to before me this 5th day of November, A. D. 1918.

(Signed) JOHN P. ENGELKE,
Notary Public.

22 EXHIBIT A.

Be it Ordained by the Mayor and City Council of the City Council of the City of Chariton:

Section 1. That Edwin B. Perrigo, his heirs and assigns, and he and his assigns are hereafter referred to as grantee, be and hereby is and are granted the right and privilege, subject to the limitations herein specified to acquire, construct, own, operate and maintain lighting, heating and power plants or works in or adjacent to the City of Chariton, County of Lucas and State of Iowa; to lay, place and maintain conduits, mains and conductors, to erect and place poles, posts, brackets, wires, transformers or other requisite fixtures or apparatus, for the supplying or transmitting of electricity for light, heat or power, and steam or hot water for heat or other purposes, in all or any of the streets, avenues, alleys, viaducts, subways and public grounds of the City of Chariton as they are now or may hereafter be laid out or exist within the present or future limits of the city; to acquire and hold any and all real property, easements and rights necessarily to such ends and purposes; to produce electric current for light, heat and power and distribute same, and to produce steam or hot water for heating or other purposes and distribute same through said streets, avenues, alleys, viaducts, subways, and public grounds of said city; to acquire, construct, maintain and operate such plants, structures and appurtenances as are necessary for the conducting and maintaining of such light, heat and power plants, together with all machinery and appliances necessary thereto; and for these purposes the grantee shall have the right to enter upon, through or under any street, avenue, alley, viaduct, subway or public ground for the purpose of removing any pavement or sidewalk therein, or thereon, and making any and all ex-

cavations necessary for the laying of conduits, conductors and mains, erecting poles and attachments and extending same; provided that such use of streets, alleys, avenues, viaducts, subways and public grounds be made with the least possible inconvenience to the inhabitants of said City, that said excavations be protected by barricades when necessary and be lighted at night, and that all sidewalks, pavements and excavations be replaced by and at the expense of the grantee in as good condition as nearly as possible as they were before in, and without unnecessary delay.

Section 2. Said conduits, mains, conductors, posts, poles, brackets, wires and other apparatus and requirements, shall be erected and placed under the supervision of the proper city official, and when practicable shall be placed in the alleys; and shall be placed so as not to interfere with the ordinary traffic on the streets, alleys and public grounds, nor with the flow of water in the gutters; and when placed in the paved streets the grantee shall restore the paving at once to as good condition as nearly as possible as the same was in before the work was done. Should any of the posts, poles, wires, conductors or appliances, authorized hereunder, become unsafe or a menace to public safety, the City Council may by resolution declare the same unsafe and order them removed. The grantee shall hold the city free and harmless from any cause of ac-
23 tion that may arise against it by reason of negligence, carelessness or misconduct of any agents or employees of the guarantee in the erection, maintainance or operation of said plants. Nothing in this ordinance shall be construed to allow the grantee to trim the trees growing on or extending into any street, alley or public ground without first obtaining the consent of the property owner or the proper city official.

Section 3. The grantee shall sell current at rates not to exceed for monthly consumption those named in the following schedules:

Lighting Rates.

1 to 50 K. W. H., 12 cents per K. W. H.
51 to 150 K. W. H., 11 cents per K. W. H.
151 to 300 K. W. H., 9 cents per K. W. H.
301 K. W. H., and over, 8 cents per K. W. H.

Power Rates.

Up to 100 K. W. H., 9 cents per K. W. H.
101 K. W. H., and up to 300 K. W. H., 8 cents per K. W. H.
301 K. W. H. and up to 500 K. W. H., 7 cents per K. W. H.
501 K. W. H. and up to 800 K. W. H., 6 cents per K. W. H.
801 K. W. H. and up to 1,000 K. W. H., 5 cents per K. W. H.
Over 1,000 K. W. H., Special contract.
Power rates to apply on motors above two horsepower
Meters shall be read monthly and charges made therefor; and a

minimum charge of seventy-five cents per month shall be made for each meter connected where readings at the prevailing rates do not equal said sum.

No meter rent shall be charged.

Street Lighting Rates.

Overhead suspended hooded incandescent street lamps; For 60 candle power lamps or their equivalent, each per annum, $15.00.

For 80 candle power lamps or their equivalent, each per annum, $18.00.

Lamps to be lighted from dusk to dawn each night.

Payment for same to be made in twelve equal monthly installments.

The grantee shall at all times furnish and maintain said lamps.

For five lamp cluster posts, as now installed, each having one top lamp of 80 candle power, to be lighted from dusk to dawn each night, and four bottom lamps, each of approximately 45 candle power, to be lighted from dusk to eleven o'clock P. M., each night or the equivalent of the above in candle power, each post per annum $36.00.

Payment for same to be made in twelve equal monthly installments.

The grantee shall furnish lamp and globe renewals for said cluster posts.

Pumping Rates.

Per kilowatt hour on meter at pumping station, 4 cents.

This rate to include operating care of pump motor or motors and pumps.

The city to pay for supplies and repairs.

24 Section 4. The City shall have the privilege, upon request of the proper authorities, of using, without cost to it, the poles of the grantee for the purpose of maintaining an electric fire alarm or patrol system, so long as said fire alarm or patrol system does not interfere with the efficiency of the light, heat and power service of the grantee.

Section 5. A meter shall be installed on the premises of each consumer for the purpose of measuring the amount of electric current, heat or service furnished, which meter shall be supplied by the grantee; and the grantee shall at all times have free access to said meter for the purpose of reading, testing and repairing the same. A deposit of five dollars ($5.00) for each meter installed may be required by the grantee from each consumer, which deposit will be returned when service is discontinued and customer's bill is paid.

Section 6. Whenever anyone shall move, according to law, any building of such size as to interfere with the wires, poles, equipment, the grantee shall, upon receiving twenty-four hours' written notice,

temporarily remove such wires, poles or equipment, but only upon being compensated for consequent expense or damage.

Section 7. Any person who shall interfere with, cut, injure, break, deface, damage or remove any of the meters, poles, wires, fixtures, conduits, conductors or property used in connection with the business of the grantee, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum not to exceed one hundred dollars ($100.00).

Section 8. The grantee if so required by said city, shall install electric service for either light or power in all cases where prospective consumers guarantee to install ten sixteen candlepower lamps or their equivalent where the distance does not exceed three hundred feet from any existing line of grantee. The grantee shall furnish, without cost to customers, service wires to connect on the exterior of the customer's building with the wiring of customer's premises.

Section 9. The grantee, by accepting the provisions herein granted, assumes and agrees to erect and install inside the city limits of Chariton, within eighteen months from the date of acceptance hereof, a new light and power plant of sufficient size and capacity, adequate for the city's needs, and agrees to maintain, generate and furnish therefrom all of the electric current for light, heat and power used in said city and furnish to said City of Chariton and its inhabitants current of even and steady voltage for light and power and of such quality as shall be deemed first class, in every respect suitable for the needs of Chariton. Said light and power shall be available at all times, both day and night.

Section 10. The grantee is hereby given, without cost to him, the privilege of using and occupying the grounds whereon the present plant is situated for the operation of the present plant for a period of eighteen months, during the time grantee is erecting and installing the new plant as herein provided. At the end of eighteen months, or upon completion of said new plant grantee shall vacate said grounds and remove all equipment and buildings therefrom.

25 Section 11. The grantee, that is, said Perrigo and his assigns, shall have and possess all and singular the rights, privileges and benefits herein granted for and during a term of twenty-five years from and after the acceptance hereof by the grantee. At the expiration of the term herein granted the City shall have, and hereby reserves, the right to purchase the plant and all of its equipment acquired or constructed under the provisions hereof, including the entire distribution system, and all property and rights and privileges of whatsoever description belonging to the grantee, upon giving to the grantee six months' prior notice in writing of its election to purchase, and by paying the actual value of all thereof in cash; said value, if not agreed upon between the city and the grantee, to be determined by disinterested and competent appraisers, sworn to ascertain said value, one to be selected by the city and one by the grantee;

and in the event the two appraisers so selected cannot agree they shall select a third; and the award of two shall be the award of the appraisers. During the existence of the term herein granted the City shall not purchase electric current from others than the grantee nor construct, acquire or operate any such plant or plants as are named or contemplated herein, or for any of the purposes named herein; and this inhibition shall be and operate as an inducement to the grantee to accept the provisions of this ordinance; and upon this inhibition the grantee may always rely.

Section 12. The grantee shall make a verified statement to the City Council once a year when demanded, showing its gross and net earnings in the operation of its business under this franchise.

Section 13. The grantee shall within ten days after the passage and approval and ratification thereof by the electors of the City of this ordinance, all as provided by law, file a written acceptance hereof with the City Clerk of the City; and in the event the grantee fails so to do no rights shall vest hereunder.

Section 14. This ordinance shall take effect and be in force from and after its passage, approval and ratification as provided by law.

26 Before the Board of Conciliation of the State of Iowa.

EXHIBIT "B."

In the Matter of the Application of the SOUTHERN IOWA ELECTRIC Company for Increased Rates for Electricity in the City of Chariton, Iowa.

Finding and Order of the Board.

Now on this 23rd day of October, A. D. 1918, the above matter coming on for hearing at Des Moines, Iowa, upon application of the Southern Iowa Electric Company for increased rates for electricity in the City of Chariton, Iowa, the applicant appearing by W. R. Roberts, its Sec'y-Treas. and the City authorities having received notice of time and place of hearing failed to appear, the Board examined and investigated their case, heard the evidence offered by the company's representative and discussed the matter under its rules, finds and orders as follows, to-wit:

1. Current for lighting.—That the applicant shall be entitled to receive in said city of Chariton, Iowa, for residence and commercial lighting for the first 50 KWH used per month 15¢; for the next 100 KWH used per month 14¢; for the next 150 KWH used per month 12¢; all excess 11¢; minimum charge of 75¢ per month per meter. An additional charge of 1/2¢ per KWH may be entered on bill but same is to be rebated if bill is paid on or before the 10th day of the month. Applies also to power. J. F. F.

2. Current for Power.—That the applicant shall be entitled to receive in said city of Chariton for power up to 100 KWH 9 3/4¢ per

KWH; 101 to 300 KWHS 8 3/4¢ per KWH; 302 to 500 KWH 7 3/4¢; 501 to 800 KWH 6 3/4¢; 800 to 1000 KWH special contract. Minimum charge of 75¢ per month per meter.

The above rates to be in effect from and after November 1st, 1918, during the period of the war and six months thereafter.

(Signed) TRUMAN A. POTTER,
Acting Chairman.
J. F. FORD,
Secretary.

27 And thereafter to-wit: On the 5th day of November A. D. 1918 there was filed in said cause a Memorandum and order of court which is in words and figures as follows to-wit:

28 In the District Court of the United States, Southern District of Iowa, Southern Division.

No. 4010. Equity.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA, and H. G. LARIMER, as Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yenger and W. F. Kull, as members of the City Council of the City of Chariton, Iowa, Defendants.

Memorandum and Order.

Filed November 5, 1918.

Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

I have had presented before this date some sixteen cases similar to this case, and in each case a temporary injunction has been granted,—not that the court has determined in any case that the company is entitled to an increased rate, but upon the well settled law that when a utility company comes into court and alleges that the rates are confiscatory, and asks that a chance be given to prove that they are confiscatory, it, of course, has a right to a trial upon this claim; but a trial would be of no value, at least during the time of litigation, if during such period the company was not allowed to collect the rate which it in good faith asserts is necessary; because if the court finally found that the claimed rate was reasonable, the company could not go back and collect from the hundreds of consumers the balance between what they paid and what they should have paid. So the rule is to allow the collection of the higher rate, but the company must file a bond to return any money collected over a reasonable rate as finally determined by the court.

I state these things at this time to avoid taking the time of counsel and the court in a hearing which might be of no value to anyone.

So I am fixing a time in which objections shall be filed. If when

such objections are presented I find any question upon which there should be a hearing at this time I will notify counsel and fix a time.

29 *Order.*

And now on November 5, 1918, the Bill of Complaint in above case being presented, it is ordered that within five days of the service of this order and a copy of the bill, the defendants shall send to the undersigned at Keokuk, Iowa, objections to the application for temporary injunction, copy of same to be sent to counsel for complainants, and thereupon counsel will be advised of further proceedings.

It will only be necessary to serve copy of bill upon the mayor of the city, but memorandum and order will be served upon each defendant.

(Signed) MARTIN J. WADE,
Judge.

Entered Equity Journal #2, Page #19.

30 And thereafter to-wit: On the 14th day of November A. D. 1918 there was filed in said cause an order for Injunction which is in words and figures as follows to-wit:

31 In the District Court of the United States, in and for the Southern District of Iowa, Southern Division.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE TOWN OF CHARITON, IOWA et al., Defendants.

Order.

Filed November 14, 1918.

Wm. C. McArthur, Clerk.

And now on this 14th day of November, A. D. 1918, the application for temporary injunction herein having been heretofore presented, and it appearing that order h*r*ertofore made by this court has been served upon defendants and that more than five days have elapsed since such service, and that no resistance or objections have been presented to the Court.

It is, therefore, ordered and adjudged: That the defendants and each of them, and all other persons who shall have notice of this order, be enjoined and restrained from in any manner enforcing by civil or criminal proceedings any of the conditions or penalties of any ordinance of the City of Chariton, or any law of the State of Iowa, until final hearing of this case or until further orders herein.

Conditioned, however,

(1) That plaintiff file a bond in the penal sum of Fifteen Thousand Dollars ($15,000), conditioned that the plaintiff shall repay to the users of electricity any sum or amount collected during the continuance of this order, over and above what may finally be determined to be a reasonable and legal rate, this Court retaining sole jurisdiction to determine the amount, time and manner of payment thereof.

(2) That the plaintiff shall keep permanent books and records showing the amount paid by each person using electricity and that a receipt shall be issued for each payment made, and that the books and records shall be open to the officers of the city at reasonable times and shall be subject to orders of the Court at all times.

32 (3) That while this order is in force, the plaintiff shall collect for electricity, rates not in excess of the rates fixed in the order of the Utility Commission, to-wit:

"1. Current for Lighting.—That the applicant shall be entitled to receive in said city of Chariton, Iowa, for residence and commercial lighting for the first 50 KWH used per month 15¢; for the next 100 KWH used per month 14¢; for the next 150 KWH used per month 12¢; all excess 11¢; minimum charge of 75¢ per month per meter. An additional charge of ½¢ per KWH may be entered on bill but same is to be rebated if bill is paid on or before the 10th of the month. Applies also to power. J. F. F.

2. Current for Power.—That the applicant shall be entitled to receive in said city of Chariton for power up to 100 KWH 9¾¢ per KWH; 101 to 300 KWHS 8¾¢ per KWH; 301 to 500 KWH 7¾¢; 501 to 800 KWH 6¾¢; 800 to 1000 KWH special contract. Minimum charge of 75¢ per month per meter."

Witness my hand this 14th day of November, A. D. 1918.

(Signed) MARTIN J. WADE,
Judge.

Entered Equity Journal #2, Page 20.

33 And thereafter to-wit: On the 18th day of November 1918 there was filed in said cause a Bond for Injunction which is in words and figures as follows to-wit:

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA, and H. G. LARIMER, as Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yengel and W. F. Kull, as Members of the City Council of the City of Chariton, Iowa, Defendants.

Bond.

Filed November 18, 1918. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

Know all men by these presents:

That Southern Iowa Electric Company, as principal, and J. P. Greenshields and A. D. Annis, as surety, are held and firmly bound unto the City of Chariton, and H. G. Larimer, as Mayor and J. M. Kneeland, J. P. Connell, R. J. Yengel, and W. F. Kull, as members of the City Council of the City of Chariton, Iowa, and all other persons who shall have notice of the order entered by the District Court of the United States in and for the Southern District of Iowa in the above entitled cause on the 14th day of November, 1918, in the penal sum of Fifteen Thousand Dollars ($15,000.00), well and truly to be paid, conditioned, however, as follows:

Whereas on the 14th day of November, 1918, upon the application of the plaintiff in the above entitled cause theretofore presented to the court, an order was made by the court that the defendants, to-wit,

34 The City of Chariton, Iowa, and H. G. Larimer, as Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yengel, and W. F. Kull, as members of the City Council of the City of Chariton, Iowa, and all other persons who shall have notice of said order be enjoined and restrained from in any manner enforcing by civil or criminal proceedures any of the conditions or penalties of any ordinance of the City of Chariton establishing or purporting to establish rates to be charged by the plaintiff for the furnishing of electric current in the City of Chariton less than the following rates, to-wit: For residence and commercial lighting and power for the first 50 K. W. H. used per month 15¢; for the next 100 K. W. H. used per month 14¢; for the next 150 K. W. H. used per month 12¢; all excess 11¢; minimum charge of 75¢ per month per meter. An additional charge of one half cent per K. W. H. may be entered on bill and same is to be rebated if bill is paid on or before the tenth of the month.

For electric current furnished for power up to 100 K. W. H. 9¾¢ per K. W. H.; 101 to 300 K. W. H. 8¾¢; 301 to 500 K. W. H. 7¾¢; 501 to 800 K. W. H. 6¾¢; 801 to 1,000 K. W. H., special contract. Minimum charge of 75¢ per month per meter, and,

Whereas the plaintiff by the terms of said order is permitted to charge and receive for electric current furnished in the city of Chariton in accordance with the above rates until final hearing in this case or until further orders therein, and,

Whereas said order is conditioned that the plaintiff shall file a bond in the penal sum of Fifteen Thousand Dollars ($15,000.00) conditioned as in said order provided,

Now therefore, if the said Southern Iowa Electric Company shall pay to the users of electricity any sum or amount collected
35 during the continuance of said order of court over and above what may finally be determined to be a reasonable and legal rate and shall keep permanent books and records showing the amount paid by each person using electricity and that a receipt shall be issued for each payment made and that the books and records shall be open to the officers of the City of Chariton at reasonable times and that the plaintiff shall not collect for electricity furnished by it at rates in excess of the rates above specified and as fixed in said order of court and shall well and truly perform all of the conditions of said order of court and orders made pursuant thereto then this obligation shall be null and void, otherwise it shall remain in full force and effect.

In testimony whereof the principal and surety have executed the foregoing bond this — day of November, 1918.

SOUTHERN IOWA ELECTRIC COMPANY,
By W. B. ROBERTS,
Secy. & Treas., Principal.
J. P. GREENSHIELDS,
A. D. ANNIS,
Surety.

Attest:

EMMET TINLEY,
Counsel for Plaintiff.

36 STATE OF IOWA,
Pottawattamie County, ss:

We, J. P. Greenshields and A. D. Annis, being first duly sworn upon oath say that we are each residents of Council Bluffs, Pottawattamie County, Iowa, and that we signed the foregoing bond as sureties and each for himself says that he is worth in excess of Thirty-Thousand Dollars ($30,000.00) beyond the amount of his death and has property in the Southern District of Iowa of a value exceeding Thirty Thousand Dollars ($30,000.00) beyond the amount of his debts.

J. P. GREENSHIELDS.
A. D. ANNIS.

Subscribed in my presence and sworn to before me this 16th day of November, 1918.

JOHN P. ENGELKE,
Notary Public.

37 And thereafter to-wit: On the 26th day of November A. D. 1918 Answer was filed by Defendants which is in words and figures as follows to-wit:

38 In the District Court of the United States, Southern District of Iowa, Southern Division.

SOUTHERN IOWA ELECTRICAL COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA, and H. G. LARIMER, as Mayor, et al., Defendants.

Answer.

Filed November 26th, A. D. 1918. Wm. C. McArthur, Clerk, by John C. Hunt, Deputy.

To the Honorable Judge of the District Court of the United States for the Southern District of Iowa:

All defendants named in the foregoing entitled cause of action, in answer to the Bill of Complaint filed by the Plaintiff herein, state:

I.

That the defendants deny the allegation contained in paragraph V of the plaintiff's Bill of Complaint to the effect that it expended the sum of Ninety-Five Thousand Nine Hundred and Eighty-eight and 15/100 Dollars in the building of a distributing system for the purpose of lighting the city of Chariton and furnishing power and light to the inhabitants thereof, and states the fact to be that if said sum of money was expended by the said plaintiff such expenditure was made necessary in order to construct a plant to carry on plaintiff's said business of furnishing light and power to other towns and cities and to certain companies and individuals under special contracts. That the defendants are not at this time possessed of sufficient knowledge of the terms of such contracts by which the said plaintiff furnishes said lights and power to said other cities and towns and individuals and companies as to enable the defendants to set them out specifically herein and asks the court to compell the plaintiff to produce the same and show to the court just what
39 part of such alleged expenditure of money was necessary for the purpose of furnishing light and power to the inhabitants of the city of Chariton, in that no injustness will be done to such inhabitants by compelling them to contribute to the expense of lighting and furnishing power to such other cities, towns, companies and individuals.

II.

That the defendants deny all of that part of paragraph VI of the plaintiff's Bill of Complaint excepting that part thereof which sets out the present schedule of rates charged by the plaintiff and excepting also such a part of said paragraph VI as may be expressly herein admitted, and states the fact to be as follows:

That during the month of July, 1914, the city council of the city of Chariton, being desirous of securing an adequate water supply for said city, appointed a committee of citizens of said city to investigate and report as to the best method of securing said water supply. That the said committee reported to the council that it had secured a certain proposition, in writing, from one Edwin B. Perrigo, the assignor to the plaintiff, of the date of August 10th, 1914, by the acceptance of which the city could secure the money with which to obtain the said water supply, and the said committee did thereupon submit to the council said written proposition, duly signed, all of which the said council duly accepted by proper proceedings, all of which proposition and proceedings had in connection therewith are hereto attached and marked "Exhibit 1". That the making of such proposition and the acceptance thereof all constitute a special, legal, valid and binding contract, under the terms of which the said Edwin B. Parrigo bound himself, his successors and assigns to furnish electrical light and power to the said city and its inhabitants for the rates as set out in paragraph VI of plaintiff's said Bill of Complaint, and that said special contract is binding at this time and the court has no jurisdiction to modify or change the same.

40 That at the time the said Edwin B. Parrigo made said written proposition the City of Chariton was the owner of its electric lighting and power plant and that to induce the said city to part with possession of the same, and transfer possession and title thereof to him, the said Edwin Parrigo not only agreed in writing to furnish the product of the said light and power plant at the rate above referred to, but he held out and represented to the citizens of the City Chariton, its council and the said citizens committee that his said proposal would be a great saving as he would furnish said product at a cheaper rate than the said city was furnishing the same, and that relying upon such representations, orally stated, published and made in writing, the said council entered into said special contract and the citizens of the said city ratified the same, and parted with their property, to-wit the said electric light and power plant.

III.

That the defendants have no means of knowing the amount of money the plaintiff has invested in its said enterprise, the amount of capital necessary to maintain the same, the amount of its current expenses, the amount of money it has in good faith borrowed and owes or the amount of its present and past income, and the defend-

ants therefore deny each and every allegation contained in the plaintiff's Bill of Complaint in reference thereto.

IV.

The defendants deny that the plaintiff has ever presented to the officials of the said city any full and complete statement of its affairs, but states it has failed to present any statement excepting its conclusions, and even then it refused to leave such statement with the council for its examination and consideration. Defendants further state that the officer representing said plaintiff corporation refused to be questioned by the city officials, and that under the
41 conditions as herein set out it is inequitable, unjust and unlawful to compel the defendants to defend this injunction suit, and under no circumstances should the issuance of an injunction be considered by the court until the plaintiff has made a full, complete and truthful statement of its financial condition, in such a manner as will enable the said officials to determine the exact conditions, is made.

V.

That the rate established by the special contract "Exhibit A" attached to plaintiff's Bill of Complaint and "Exhibit 1" attached to defendants' answer, is just reasonable and adequate, and furnished and procures to the plaintiff a fair return on all capital invested and all expense incurred by it in supplying the individual consumer residing in the city of Chariton with electricity. That the said rate is the highest rate paid by any one of the plaintiff's numerous patrons, and that if the said plaintiff is sustaining any loss it is not because of the unreasonableness of the rate which it seeks by this action to raise, but because of loss which it sustains because of its contracts with patrons and consumers of its product outside of the city of Chariton, and that the court appealed to has no jurisdiction, by injunction or otherwise, to compel the citizens of the city of Chariton to make up for such loss.

VI.

That on or about the 15th day of November, 1918, the said plaintiff, without any authority whatsoever being granted to it, arbitrarily increased the rate to the individual consumer of its product within the city of Chariton to an amount which is unreasonable, unfair and unjust, all of which is shown by a copy of its statement mailed to said consumers, attached hereto, marked "Exhibit 2" and made a part hereof, which increased rate is in direct violation of the
42 special contract herein referred to and the ordinance.

VII.

That said special contract and ordinance are wholly valid and in force and effect at this time, and it is the legal duty of the defendants to see that the same are fully enforced, and until the same are set aside and declared void and of no effect the court has no jurisdiction to prevent the defendants, the duly and legally constituted officers of the city of Chariton, from performing their plain duty in respect thereto.

VIII.

That the rate as fixed by said special contract must prevail until the same is modified, changed or annul-ed by some duly constituted legal authority, and an injunction cannot legally issue which in effect changes the said rate.

Wherefore the defendants pray that the temporary writ of injunction heretofore issued by this court be dissolved and that the plaintiff's prayer for a permanent injunction be denied.

THE CITY OF CHARITON, IOWA, H. G. LARIMER, AS MAYOR, AND J. M. KNEELAND, C. P. CONNELL, R. J. YENGEL, W. F. KULL, AS MEMBERS OF THE CITY COUNCIL, DEFENDANTS.

(Signed) By J. W. KRIDELBAUGH,
Attorney for Defendant.

43

EXHIBIT 1.

To W. A. Eikenberry, E. A. Anderson, A. B. Gookin, G. W. Ensley, H. B. Blanchard, and Oscar J. Isreal, Committee appointed by the city council of the city of Chariton, Iowa, to invite bids for the purchase of the electric light plant now owned by said city, and to the Mayor and City Council of said city of Chariton:

GENTLEMEN:

Having been advised that the city of Chariton desires to sell its electric light plant, and is willing to grant to the purchaser a franchise for the conducting during a term of years of an electric lighting heating and power business, I hereby make and submit the following proposal:

Appended hereto, and constituting a part of, is a form of an ordinance which, when passed and approved and ratified by the mayor and city council and electors of the city of Chariton, I will accept; and upon the passage, approval, ratification, and acceptance thereof I will pay in cash to the city of Chariton the sum of Sixty Five Thousand Dollars for all the rights, privileges and benefits granted to me or to my assigns, in, by and under said ordinance, and for all

of the property now constituting the electric lighting, heating and power plant of the city of Chariton, and consisting of boilers and piping, engines, generators, exciters, switchboards and all other power house equipment and supplies, and also all poles, wires, cross-arms, braces, transformers, conduits, conductors, meters, or other property and supplies belonging to the transmission system of said city, and also all other property of whatsoever description, including all records and contracts, excepting the real estate pertaining to said electric plant, the electrolier posts and office furniture. The city of Chariton to grant to me or assigns free from rent or cost the possession and use of the real estate and buildings now used by it in the production of electric lights, heat and power for a period of eighteen months after I or assigns become possessed of the property hereinabove described. It is understood that all property hereinabove mentioned pertaining to said electric light plant, excepting real property, electrolier posts and office furniture, which may be now owned or acquired up to the time I come into possession of the plant, shall pass to me and also all records and contracts, and that I shall become possessed of all the property free from all claims or incumbrances.

I further agree to purchase meters now owned by customers of about two hundred and twenty in number at a fair cash value.

I will enter into the street lighting and pumping contract hereto appended.

The expense of a special election called for the purpose of submitting the franchise ordinance to the voters will be paid by me.

I herewith enclose and deposit a certified check in the sum of Five Thousand Dollars as an evidence of my good faith, which, when this proposition is accepted, may be retained, and shall apply upon the purchase price, but which shall be immediately returned to me in the event this proposition is rejected.

This proposition, in order to bind me, shall be accepted by the mayor and city council of said city and the street lighting and pumping contract hereto appended entered into within ten days from the date hereof, and the ordinance hereto appended shall be duly passed, approved and ratified, all as provided by law, within sixty days from the date hereof.

Respectfully submitted,

EDWIN B. PERRIGO.

44 W. A. Eikenberry, E. A. Anderson, A. B. Gookin, G. W. Ensley, Oscar J. Isreal, H. B. Blanchard, Citizens' Committee; J. M. Kneeland, F. B. Curtis, E. F. Gasser, Electric Light Committee of the City Council.

After reading the same, the following resolution was offered and was read by the clerk:

Resolution.

Be it resolved, by the city council of the city of Chariton, Iowa, that the proposals submitted by Edwin Perrigo to purchase the Electric Light Plant of the said city of Chariton, Iowa, for the

consideration of Sixty Five Thousand Dollars (65,000.00) and signed by Edwin B. Perrigo, and accepted and signed by the committee composed of W. A. Eikenberry, A. B. Gookin, E. A. Anderson, G. W. Ensley, O. J. Israel, and H. B. Blanchard, citizens, and J. M. Kneeland, F. B. Curtis, and E. F. Gasser, members of the electric light committee of the city council of the said city of Chariton, Iowa, be and the same is hereby accepted and approved with the terms and conditions therein contained, and further that this council approves the franchise ordinance agreed upon by the said Edwin B. Perrigo and the members of said committee.

J. C. SEWARD,
Mayor.

G. J. GITTINGER,
City Clerk.

A motion was made by Gasser, seconded by Kestler, that the said resolution be passed and adopted, the mayor ordered the clerk to call the roll, which was done, councilmen present and voting as follows:—Kneeland, yea, Curtis, yea, Gasser, yea, Kestler, yea, Boss absent and not voting. There being four yeas and no nays whereupon the Mayor declared the motion carried and the resolution thereby passed and adopted. The following resolution was offered and was read by the Clerk:

Resolution.

Be it resolved, by the City Council of the City of Chariton, Iowa, that the Mayor and the City Clerk be, and they are hereby instructed and directed to sign and execute on behalf of said Chariton, Iowa, conditional contract with Edwin B. Perrigo, for lighting the street and for power for pumping the water, for the said City of Chariton, Iowa, submitted by and executed by the said Edwin B. Perrigo.

J. C. SEWARD,
Mayor.

G. J. GITTINGER,
City Clerk.

A motion was made by Curtis, seconded by Kneeland, that the resolution be passed and adopted, the Mayor ordered the Clerk to call the roll which was done, councilmen present and voting as follows: Kestler, yea, Gasser, yea, Curtis, yea, Kneeland, yea, Boss absent and not voting, there being four yeas and no nays, whereupon the Mayor declared the motion carried. The resolution thereby passed and adopted.

The following is a true copy of the contract referred to in the above resolution:

Agreement—Street Lighting Electroliers, Chariton, Iowa.

Whereas, The city of Chariton, Iowa, may sell and dispose of to Edwin B. Perrigo, his heirs, and assigns, the Electric Light property now owned by the City and the said city desires to secure a contract to light its streets and for pumping water.

45 Witnesseth, That the said Edwin B. Perrigo, his heirs or assigns, hereinafter known as party of the first part, and the City of Chariton, Iowa, hereinafter known as party of the second part, contract and agree each with the other as follows:

The party of the first part, upon acquiring the electric light property now owned by the party of the second part, will furnish to the said party of the second part for the purpose of ligthing its streets, alleys, and public places, overhead suspended hooded incandescent street lamps as are now installed at the following rates and prices:

For 60 candle power lamps or their equivalent each per annum, $15.00, for eighty candle power lamps or their equivalent, each per annum, $18.00. Lamps to be lighted from dusk to dawn each night. Said lamps and equipment to be furnished and maintained by party of the first part.

In the event of any of said lights not burning during the time required by this contract, the city shall have the right to deduct the pro rata amount from the bill for each night such light fails to be lighted for more than three consecutive nights, after receipt by first party of written notice from the proper city official that said light is not burning.

The party of the second part agrees not to order any lamp installed at a greater distance than 250 feet from a then existing inca-descent street lamp.

For five light cluster posts as are now installed, each having one top lamp of 80 candle power, to be lighted from dusk until dawn each night, and four bottom lights each of approximately 45 candle power to be lighted from dusk until 11 o'clock each night, or the equivalent of the above in candle power, each post for the sum of $36.00 per annum or additional posts installed in the future under the same conditions, that is; the post complete to be furnished by the city and installed only by the party of the first part in the same manner as those now placed at the same price; the party of the first part to furnish all lamps and globe renewals and to paint posts once each year and keep globes cleaned. The posts installed under this agreement are to be maintained by said second party. Payment to be made in twelve equal monthly installments.

Pumping Rates.

Party of the first part agrees to sell to the party of the second part electric current of approximately twenty-three hundred (2300) volts and service for pumping of city water at 4 cents per kilowat-

hour as recorded, by a meter furnished by first party to second party at its pumping station; this rate also to include the operating of second party's pump motor or motors and pump or pumps. The party of the second part agrees to pay for all supplies and repairs and to pay the rate named for electric current and service.

The party of the first part agrees to furnish the material for and to construct, at actual cost of material and labor, a transmission line over the most practicable route from the water pumping station of said city located without the corporate limits of said city to the city limits as now existing, and at the city limits connect said transmission line to a transmission line constructed by the party of the first part at its own expense and running within the city from the city limits as now existing to the electric generating station of the first party.

The party of the first part shall, without cost to it, have the free use, in serving other customers, of the transmission line without the city limits, as now existing.

The city agrees to pay the cost of the transmission line without the city limits, as now existing, when same is completed.

All street lights provided for in this agreement shall be placed at such points within the city limits as are designated by the city council or its representative, providing that, should the city require the re-location of any such lights after having them once located, then said city shall pay the actual cost of labor and
46 material necessary to the re-location of such light or lights;

This contract shall take effect and be binding on and after date when the party of the first part shall have acquired the electric property now owned by the city of Chariton and shall continue in full force during the term of the grant by said city to the party of the first part contained in ordinance No. 98 of said city; provided, however, that on the 30th day of September, 1919, said city may terminate this contract by giving to the party of the first part thirty days' written notice prior thereto of its intention so to do; and in the event of the giving by said city of said notice the parties hereto shall thereupon enter into a new contract with all provisions like those herein contained except as to rates and prices, which shall be just and reasonable; and during the continuance of said grant said city shall in five years periods after the 30th day of September 1919, that is on the 30th day of September 1924, the 30th day of Sept. 1929 and the 30th day of Sept. 1934, have the right to terminate any existing contract upon giving to the party of the first part thirty days' written prior notice and entering into a new contract with provisions in all particulars like those in the existing contract except as to rates and prices, which shall be just and reasonable, unless notice is given as herein provided any existing contract shall continue in full force and effect.

In testimony whereof the parties hereto have hereunto set their respective hands in the city of Chariton, state of Iowa, on this 10th day of August A. D. 1914.

EDWIN D. PERRIGO,
J. C. SEWARD,
Mayor of the City of Chariton, Iowa.
G. J. GITTINGER.
Clerk of the City of Chariton, Iowa.

In the presence of
F. M. WAYNICK.

47 EXHIBIT 2.

Southern Iowa Electric Company.

Chariton, Iowa.

November 15, 1918.

To our customers:

The Southern Iowa Electric Company now finds itself unable to continue longer the rates that have been in effect in the past. These rates were considered fair, reasonable and compensatory at the time they were established, but

Conditions Have Changed.

The world war has affected all of you. It has affected us more than most because it has increased our cost of producing electricity without any attendant advance in the selling price or increase in income. Is there a Merchant, Manufacturer, or Jobber in Chariton, who has not advanced his Selling Price to meet his Increased Cost?

The baker cannot remain in business and sell bread made from $2.00 wheat at the same price he sold bread made from $1.00 wheat. The grocer cannot now profitably sell 20 pounds of sugar for $1.00, neither can the butcher sell sirloin steak at 15 cents a pound, except at a loss. Would it be reasonable to expect them to do so?

Applied to the Production of Electricity the same Conditions prevail. There is no mystery about the business of producing and distributing electricity. Three principle things enter into the cost of producing and distributing electricity.

Coal—Supplies—Labor.

Over half of the cost of producing electricity is for coal.

Price per ton before the war	$1.40
Price now per ton	3.20
Increase	129%

We will use nearly 4,000 tons this year to generate electricity used in Chariton.

Supplies have increased from 50 to 200 per cent since the war. Labor has increased 25 to 40 per cent.

We are selling electricity at the same price as before the war and losing money. Some loss last year—many thousand dollars this year.

To continue solvent, we must either Limit Service or Increase Rates. Poor service will retard the development of Chariton and cause great inconvenience to the public.

We feel the best interests of all concerned would be better conserved by raising rates.

Therefore, we trust, in your sense of fairness and justice, and believe that you will approve of the slight necessary increase in rates hereafter announced.

Beginning with November bills and until further notice, electric rates will be:

For Residence and Commercial Lighting.

48 For the 1st 50 kilowatt hours used per month, 15 cts. per kilowatt hour.

For the next 100 kilowatt hours used per month, 14 cts. per kilowatt hour.

For the next 150 kilowatt hours used per month, 12 cts. per kilowatt hour.

For all excess kilowatt hours used per month, 11 cts. per kilowatt hours.

Minimum $1.00 per month.

For Power.

For up to 100 kilowatt hours used per month, 9¾ cts. per kilowatt hour.

For 101 to 300 kilowatt hours used per month, 8¾ cts. per kilowatt hours.

For 301 to 500 kilowatt hours used per month, 7¾ cts. per kilowatt hour.

For 501 to 800 kilowatt hours used per month, 6¾ cts. per kilowatt hour.

Minimum $1.00 per month, per H. P.

An additional one-half cent per kilowatt hour will be added to the bills, same to be rebated if bill is paid on or before the 10th of the month.

After applying these rates we Still Lose Money, but we can keep our heads above water.

Sincerely,

SOUTHERN IOWA ELECTRIC COMPANY.

P. S.—On account of being delayed in advising you of this change in rates one-half the November bill will be charged at the old rate.

49 And thereafter to-wit: On the 28th day of December A. D. 1919 there was filed in said cause order granting leave to file amendment to Bill of Complaint which is in words and figures as follows to-wit:

In the District Court of the United States in and for the Southern District of Iowa, Southern Division.

No. 4010. Equity.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

CITY OF CHARITON, IOWA, et al., Defendants.

Order.

Filed Dec. 28, A. D. 1918. William C. McArthur, Clerk, by John C. Hunt, Deputy.

It is ordered, that permission be and it is hereby given to the plaintiff to file forthwith an amendment to its bill of complaint.
December 28, 1918.

(Signed) MARTIN J. WADE,
Judge.

Entered equity journal #2, page 22.

50 And thereafter to-wit: On the 28th day of December A. D. 1918 Amendment to Bill of Complaint was filed which is in words and figures as follows to-wit:

51 In the District Court of the United States, Southern District of Iowa, Southern Division.

#4010. Equity.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, Iowa, and H. G. LARIMER, as Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yengel, W. F. Kull and O. E. Lamb, as Members of the City Council of the City of Chariton, Iowa, Defendants.

Amendment to Bill of Complaint.

Filed Dec. 28, A. D. 1918. William C. McArthur, Clerk, by John C. Hunt, Deputy.

To the Honorable Judge of the Disrtict Court the United States for the Southern District of Iowa:

The plaintiff, Southern Iowa Electric Company, permission being first granted by the court, presents herewith the following amendment to its bill of complaint against the City of Chariton, Iowa, and the Mayor and members of the City Council thereof.

1. That prior to the month of July, 1914, the City of Chariton was the owner of an electric light plant and was engaged in the operation thereof, furnishing electric current for the lighting of streets, and public places, pumping water and for the furnishing of light and power to the *City* inhabitants of the city; that said light plant was deficient and in a poor state of repair and incapable of supplying the needs of the City of Chariton for public and private lighting and power; that it then was necessary for the proper furnishing of light and power to the City of Chariton and its inhabitants that said light plant should be re-constructed. Plaintiff further alleges the
52 fact to be that the water supply then possessed by the City of Chariton was inadequate and that a public necessity existed for the procuring of an adequate water supply; that the said City of Chariton was then not possessed with the means with which to reconstruct said light plant and to make the necessary provision for an adequate water supply and was incapable of procuring the necessary money with which to meet such expenses and that during the month of July 1914, the said city proposed to sell its said electric light plant and to enter into a contract with the purchaser thereof for the lighting of its streets and the furnishing of power for the operation of its water works, and said city invited proposals for the purchase of said electric light plant and entered into a contract; that thereupon, to-wit, on the 10th day of August, 1914, one Edwin B. Perrigo presented a written proposal to the regularly appointed committee acting for the

City of Chariton which proposal is in words and figures following, to-wit:

"Omaha, Neb., August 10, 1914.

To W. A. Eikenberry, E. A. Anderson, A. B. Gookin, G. W. Ensley, H. B. Blanchard, and Oscar J. Isreal, Committee Appointed by the City Council of the City of Chariton, Iowa, to Invite Bids for the Purchase of the Electric Light Plant now Owned by Said City, and to the Mayor and City Council of said City of Chariton,

GENTLEMEN:

Having been advised that the City of Chariton desires to sell its electric light plant, and is willing to grant to the purchaser a franchise for the conducting during a term of years of an electric lighting heating and power business, I hereby make and submit the following proposal:—

Appended hereto, and constituting a part of, is a form of an ordinance which, when passed and approved and ratified by the mayor and city council and electors of the city of Chariton, I will accept; and upon the passage, approval, ratification, and acceptance thereof, I will pay in cash to the City of Chariton the sum of Sixty Five Thousand Dollars for all the rights, privileges and benefits granted to me or to my assigns, in, by and under said ordinance, and for all of the property now constituting the electric lighting, heating and power plant of the city of Chariton, and consisting of boilers
53 and piping, engines, generators, exciters, switchboards and all other power house equipment and supplies, and also all poles, wires, cross-arms, braces, transformers, conduits, conductors, meters, or other property and supplies belonging to the transmission system of said city, and also all other property of whatsoever description, including all records and contracts, excepting the real estate pertaining to said electric plant, the electrolier posts and office furniture. The city of Chariton to grant to me or assigns free from rent or cost the possession and use of the real estate and buildings now used by it in the production of electric lights, heat and power for a period of eighteen months after I or assigns become possessed of the property hereinabove described. It is understood that all property hereinabove mentioned pertaining to said electric light plant, excepting real property, electrolier posts and office furniture, which may be now owned or acquired up to the time I come into possession of the plant, shall pass to me and also all records and contracts, and that I shall become possessed of all the property free from all claims or incumbrances:

I further agree to purchase meters now owned by customers of about two hundred and twenty in number at a fair cash value.

I will enter into the street lighting and pumping contract hereto appended.

The expense of a special election called for the purpose of submitting the franchise ordinance to the voters will be paid by me.

I herewith enclose and deposit a certified check in the sum of Five Thousand Dollars as an evidence of my good faith, which, when this

proposition is accepted, may be retained, and shall apply upon the purchase price, but which shall be immediately returned to me in the event this proposition is rejected.

This proposition, in order to bind me, shall be accepted by the mayor and city council of said city and the street lighting and pumping contract hereto appended entered into within ten days from the date hereof, and the ordinance hereto appended shall be duly passed, approved and ratified, all as provided by law, within sixty days from the date hereof.

Respectfully submitted,

EDWIN B. PERRIGO."

That thereafter said proposal was presented to the City Council of the City of Chariton and was by said city council duly accepted and thereupon a written contract was agreed to and executed by the said Edwin B. Perrigo and by the City of Chariton, copy of which said contract is hereto attached, marked "Exhibit A" and made a part hereof.

54

II.

That concurrently with the execution of said contract there was presented to the city council an ordinance purporting to grant to the said Edwin B. Perrigo and his assigns the right to construct, maintain and operate an electric plant with its necessary poles, wires and other fixtures along the streets and public places of the City of Chariton. That the said ordinance so presented, is identical with the ordinance referred to in plaintiff's original bill of complaint, and said ordinance was subsequently adopted as in said bill of complaint alleged.

III.

That by the terms of said contract the said Edwin B. Perrigo obligated himself to pay to the City of Chariton the sum of Sixty-five Thousand Dollars ($65,000.00) for the electric plant and to reconstruct the same and that he and this plaintiff as his assignor, fully carried out the terms of that contract and paid to the city of Chariton the said sum of Sixty-five Thousand Dollars ($65,000.00) and reconstructed the electric plant, expending thereon the sums alleged in the original bill of complaint.

IV.

That according to the terms of the resolution adopted by the City Council of the City of Chariton at the time it invited proposals for the purchase of its electric plant the said City of Chariton imposed an essential condition that the purchaser would agree to furnish current for street lighting and pumping water for the city and also furnish light and power to private individuals and should enter into an

55 agreement in writing to that effect. That according to the terms of the written contract hereinbefore referred to and attached hereto, the said Edwin B. Perrigo and his assigns agreed to sell to the City of Chariton electric current of approximately twenty-three hundred volts and service for pumping city water at four cents per kilowat- hour as recorded by a meter furnished by Edwin B. Perrigo or his assigns, to the City of Chariton, at its pumping station. This rate to include the operation of the city's pump, motor or motors, and pump or pumps. The City of Chariton agreeing to pay for all supplies and repairs and to pay the rate named for electric current and service. The said Edwin B. Perrigo and his assigns agreed to furnish the material and to construct at actual cost of material and labor a transmission line over the most practicable route from the water pumping station of said city, located without the corporate limits of said city, to the city limits, as then existing, and to connect with its transmission lines at the city limits. The said city agreed upon its part to pay for the cost of construction of said transmission line outside of the city limits and that the said Edwin B. Perrigo and his assigns might use the same for other purposes in supplying other customers. That the ordinance above referred to by Section three thereof prescribed maximum rates for both public and private lighting, including the furnishing of power for pumping water for the city.

V.

That immediately after the entering into the contract with the said Edwin B. Perrigo hereinbefore referred to and after the said defendant city had received from him, the said Edwin B. Perrigo the sum of Sixty-five Thousand Dollars ($65,000.00) the said
56 city of Chariton commenced the construction of its new water plant and the sinking of the necessary wells and thereafter in violation of the terms of its contract with the said Edwin B. Perrigo, assigned to this plaintiff, entered into a contract for the purchase of gas engines and equipped its pumping plant with engines to be operated by gas. That the said defendant thereupon declined to construct or pay for the construction of a power line leading from the city limits to its pumping station and refused to permit plaintiff to furnish the power for the pumping of its water. That this plaintiff as the assignee of said Edwin B. Perrigo, in the re-construction of the power plant for the furnishing of electric current for light and power, equipped the same for the purpose of being in a position to furnish current of the voltage required by the said contract and to furnish current for use of the City of Chariton in pumping its water. That plaintiff expended additional sums of money in the production of its equipment in order that the equipment would be fully adequate for the pumping of water for the city of Chariton in addition to furnishing current for its other uses.

VI.

Plaintiff further alleges the fact to be that the rates set forth in Section three of the ordinance above referred to were rates ascer-

tained and determined by the said city of Chariton to be adequate for the furnishing of compensation for the service rendered, and that said rates, taking into consideration the established business in the City of Chariton, the users of current, the street lighting and the consumption of power by the city for the pumping of water, would produce a return sufficient to pay a reasonable income upon the amount
of capital invested and necessarily invested in the property
57 essential for the performing of the service, as well as the expense of operation. That said rates were so determined by said city with the view of equitably distributing the cost of service among the users of power and of light, including the municipality and the inhabitants thereof. That at the time of the adoption of said ordinance and at the time of the action by said city in determining the rate to be charged for each class of service, the said city council was fully advised of the quantity of current consumed and that would be consumed and of the cost of performing the service. That in the making of said rates the said city of Chariton and the officers thereof had in mind the continuance of normal conditions and had full knowledge of the character of supplies necessary for the carrying on of the business of furnishing current and of the cost of labor, and had full knowledge of the expense of freight in connection with the prosecution of such a business. That neither said city nor the said Edwin B. Perrigo nor this plaintiff had in contemplation the possibility of a war or that costs of material and labor would be governed by other sources than the laws of supply and demand. That neither said city nor the said Edwin B. Perrigo, nor this plaintiff had in contemplation the fact that the government might establish arbitrary prices for the cost of all materials used in the production of electric current and greatly increasing the cost thereof. That the rates set forth in said ordinance are interdependent in that it was contemplated by both the said city of Chariton and by the said Edwin B. Perrigo and by this plaintiff that the rates as established, shall pass to me and also all records and contracts, and that I shall become possessed of all the property free from all claims or lished would produce an aggregate sum and that such aggregate sum would be made up from the items coming from private consumers, commercial users, street lighting and pumping rates. That the pur-
pose on the part of said city and the said Edwin B. Perrigo
58 was to produce a set of rates as applied to the then known conditions in the City of Chariton respecting the consumption of current that would produce an adequate return, making reasonable compensation for the amount of capital necessarily and properly invested and the expense of operation. That the failure on the part of said city to permit this plaintiff to furnish electric current for the pumping of water deprived plaintiff of approximately the sum of $2,500.00 per year, and that the said city at the time of its refusal to permit plaintiff to pump said water, had full knowledge that its gross revenue would be reduced by such amount and that the rates as applied to other users would not furnish an adequate revenue to meet the necessary expense of operation and to make a reasonable return upon capital necessarily invested in necessary equipment.

VII.

The plaintiff further says that the said City of Chariton and all of the defendants herein, have persistently declined to permit plaintiff to furnish the current for the pumping of said water and that the said City of Chariton and all of the defendants have had full knowledge that the said Edwin B. Perrigo and this plaintiff paid to said city the sums of Sixty-five Thousand Dollars ($65,000.00) in money and expended large sums of money in the reconstruction of said lighting plant, relying upon the agreement of said city to accept current for the pumping of water and to pay the rate specified in said ordinance for the current so used and for the current required for such use. That the said defendant, each and all of them, have during all of said time, known that the said Edwin B. Perrigo and this plaintiff relied upon the aggregate income as being adequate
59 under normal conditions to meet expense of operation and make a reasonable return and that the said Edwin B. Perrigo and this plaintiff would not have paid said sum of money to the city and would not have expended the large sums of money in reconstruction of said plant excepting that it believed it would have been permitted to furnish the current for the pumping of said water. That the said defendants, each and all of them, at all times have known that each separate rate was fixed at a specific amount, depending upon the demand for current for the aggregate users, including the city, for all purposes, and private consumers. That by reason of the facts herein alleged, the defendants are estopped to claim that the rates established by said ordinance are the maximum rates beyond which rates shall not be fixed.

VIII.

Plaintiff further says that by the terms of the contract hereinbefore referred to the defendant, City of Chariton, agreed to pay the cost of construction of transmission line beyond the city limits as then existing, and to connect with its water plant, and that it was specially provided by said contract that the plaintiff should have the right to use said transmission line without any cost whatsoever for the supplying of customers without the City of Chariton; that it was contemplated by the said Edwin B. Perrigo and his assigns and the City of Chariton at the time said contract was entered into that the said Edwin B. Perrigo and his assigns intended the supplying of electric current to the users thereof outside of the city of Chariton. That the plaintiff repeatedly demanded of the said city that it meet the construction of said line and permit the construction thereof by the shortest route practicable to its water plant, but that the said city refused and thereupon it became necessary for the
60 plaintiff to construct a temporary line for the furnishing of service to the users of electricity outside the City of Chariton, and this required the investment of the sum of about Twenty-five Hundred Dollars ($2,500.00) and that to that extent the capital invested was increased. That at the time of entering into said con-

tract the parties thereto each relied upon the rates specified as being sufficient under ordinary conditions to furnish a return for all capital necessarily invested in the necessary equipment and that the inforced increase of capital by failure of the city to keep its contract required an increased revenue in order that the return contemplated by the parties to said contract should be made. Plaintiff further says that in the construction of said line the same was not constructed along the most practicable and shortest route possible because such route was controlled by the city of Chariton and that it became necessary for the plaintiff to expend only such sum of money as was necessary because of the necessity to hold itself in readiness to comply with the terms of said contract and the construction of a permanent line by the most practicable and shortest route leading from the city to the pumping plant. That it will now be necessary to reconstruct said line in a permanent way and such necessity arises because such line carries electric current at a high voltage and the defendants and all officers of the city of Chariton knew the purpose for which said line was used and to be used and that the same was designed to carry electric current at a voltage of approximately 2,300 volts. That the cost of reconstruction will involve an increase of capital in the amount of approximately Six Thousand Dollars ($6,000.00) and that such increases of capital was brought about by the defendants' failure and refusal to observe the terms of said contract and such increase
61 of capital necessitates an increase of revenue beyond that which was contemplated by the parties at the time said contract was entered into.

The plaintiff asks the court that permission be granted unto it to file this amendment to its bill of complaint and that the defendants and each of them be required within a specific time to answer the same, but not under oath, as an answer under oath is specially waived. The plaintiff prays that it have the relief granted in its original bill of complaint; that it be permitted to charge and receive from the users of current in the City of Chariton the rates set forth in the order of court entered upon the filing of its original bill of complaint. That until such time as the City of Chariton shall receive and pay for current for the pumping of its water that said city and all officers thereof be restrained from enforcing Section Three of the Ordinance referred to in the original bill of complaint. That plaintiff shall have such other and further relief as may be equitable.

SOUTHERN IOWA ELECTRIC COMPANY,
By EMMET TINLEY,
W. E. MITCHELL,
J. C. PRYOR, JR.,
D. L. ROSS,
Counsel for Plaintiff.

62 STATE OF IOWA,
Pottawattamie County, ss:

I, Willis Todd, being first duly sworn on my oath say that I am President of Southern Iowa Electric Company, the above named corporation, complainant in the above entitled action. That said complainant is a corporation organized under the Laws of the State of Delaware; that as President I have charge of the business of the corporation and I am fully informed as to all of its property and as to the business carried on by it. That I have read the foregoing amendment to the bill of complaint and the statements therein contained are true.

WILLIS TODD.

Subscribed in my presence and sworn to before me this 30 day of December, 1918.

[SEAL.] JOHN P. ENGELKE,
Notary Public.

63 EXHIBIT A.

Agreement—Street Lighting—Electroliers—Chariton, Iowa.

Whereas, The City of Chariton, Iowa, may sell and dispose of to Edwin B. Perrigo, his heirs, and assigns, the Electric Light property now owned by said city and the said city desires to secure a contract to light its streets and for pumping water.

Witnesseth, That the said Edwin B. Perrigo, his heirs or assigns, hereinafter known as the party of the first part and the City of Chariton, Iowa, hereinafter known as party of the second part, contract and agree each with the other, as follows:

The party of the first part, upon acquiring the electric light property now owned by the party of the second part, will furnish to said party of the second part for the purpose of lighting its streets, alleys and public places, overhead suspended hooded incandescent street lamps as are now installed, at the following rates and prices:

For sixty candle power lamps or their equivalent each per annum, $15.00. For eighty candle power lamps or their equivalent each per annum, $18.00. Lamps to be lighted from dusk to dawn each night. Said lamps and equipment to be furnished and maintained by party of the first part.

In the event of any of said lights not burning during the time required by this contract, the city shall have the right to deduct the pro-rata amount from the bill for each night such light fails to be lighted for more than three consecutive nights, after receipt by first party of written notice from the proper city official that said light is not burning.

The party of the second part agrees not to order any lamp installed at a greater distance than three hundred and fifty feet from a then existing incandescent street lamp.

For five light cluster posts as are now installed, each having one top lamp of eighty candle power, to be lighted from dusk until dawn each night, and four bottom lights each of approximately forty five candle power to be lighted from dusk until 11:00 o'clock each night, or the equivalent of the above in candle power, each post for the sum of $36.00 per annum, or additional post installed in the future under the same conditions, that is: the post complete to be furnished by the city and installed only by the party of the first part in the same manner as those now placed at the same price; the party of the first part to furnish all lamps and globe renewals and to paint posts once each year and keep globes clean. The posts installed under this agreement are to be maintained by said second party. Payment to be made in twelve equal monthly installments.

Pumping Rates.

Party of the first part agrees to sell to the party of the second part electric current of approximately twenty three hundred (2300) volts and service for pumping of city water at four cents per kilowatt hour as recorded, by a meter furnished by first party to second party at its pumping station; this rate also to include the operating of second party's pump motor or motors and pump or pumps. The party of the second part agrees to pay for all supplies and repairs and to pay the rate named for electric current and service.

The party of the first part agrees to furnish the material
64 for and to construct, at actual cost of material and labor, a transmission line over the most practicable route from the water pumping station of said city located without the corporate limits of said city to the city limits as now existing, and at the city limits connect said transmission line to a transmission line constructed by the party of the first part at its own expense and running within the city from the city limits as now existing to the electric generating station of the first party.

The party of the first part shall, without cost to it, have the free use, in serving other customers, of the transmission line without the city limits, as now existing.

The city agrees to pay the cost of the transmission line without the city limits, as now existing, when same is completed.

All street lights provided for in this agreement shall be placed at such points within the city limits as are designated by the city council or its representative, providing that, should the city require the relocation of any such lights after — have been once located, then said city shall pay the actual cost of labor and material necessary to the relocation of such light or lights.

This contract shall take effect and be binding on and after date when the party of the first part shall have acquired the electric property now owned by the City of Chariton, and shall continue in full force during the term of the grant by said city to the party of the first part contained in Ordinance No. 98 of said city; provided, however, that on the 30th day of September, 1919, said City may terminate this contract by giving to the party of the first part thirty days

written notice prior thereto of its intention so to do; and in the event of the giving by said city of said notice the parties hereto shall thereupon enter into a new contract with all provisions like those herein contained except as to rates and prices, which shall be just and reasonable; and during the continuance of said grant said city shall in five years periods after the 30th day of September, 1919, that is on the 30th day of September 1924, the 30th day of September 1929, and the 30th day of September 1934, have the right to terminate any existing contract upon giving to the party of the first part thirty days written prior notice and entering into a new contract with provisions in all particulars like those in the existing contract except as to rates and prices, which shall be just and reasonable. Unless notice is given as herein provided any existing contract shall continue in full force and effect.

In testimony whereof the parties hereto have hereunto set their respective hands in the city of Chariton, State of Iowa, on this tenth day of August, A. D. 1914.

EDWIN B. PERRIGO,
J. C. SEWARD,
Mayor of the City of Chariton, Iowa.
G. J. GITTINGER,
Clerk of the City of Chariton, Iowa.

In the presence of:

F. M. WAYNICK.

65 And thereafter to wit: On the 24th day of March, A. D. 1919, there was filed in said cause Memorandum Opinion which is in words and figures as follows, to wit:

66 In the District Court of the United States for the Southern District of Iowa.

MUSCATINE LIGHTING COMPANY

vs.

CITY OF MUSCATINE.

FORT MADISON GAS LIGHT COMPANY

vs.

CITY OF FORT MADISON et al.

IOWA GAS & ELECTRIC COMPANY

vs.

CITY OF MOUNT PLEASANT et al.

SOUTHERN IOWA ELECTRIC COMPANY

vs.

CITY OF CHARITON.

IOWA ELECTRIC COMPANY

vs.

CITY OF FAIRFIELD.

Memorandum Opinion.

Filed March 24, 1919.

William C. McArthur, Clerk, by Louis J. Adelman, Deputy.

(1) I cannot do more at this time than to briefly record the conclusions which I have reached after the extensive and helpful arguments presents in these cases. Any attempt to review the wilderness of authorities cited, or to distinguish between apparently conflicting opinions of the courts, would be fruitless, even if I had the time.

The most of the cases at bar involve the question as to whether a specific provision in a franchise ordinance fixing the price which shall be charged by the grantee of the franchise, is binding upon such grantee. It is not disputed that such provision is subject to modification by the city under its general power to "regulate and fix" rates.

It is earnestly contended that the power to "regulate and fix," excludes the power of the city to contract. This may be granted so far as a contract binding on a city is concerned; but I can-

67 not agree that there is any limitation upon the power of the city to "regulate and fix" by contract, as well as by ordinance or resolution.

It is a general rule with relation to the exercise of the power by a city, that "if the mode of exercise is not prescribed in the act or charter conferring the power, or in some other statute, the corporation may exercise the power in any usual and appropriate manner, according to its own discretion. 28 Cyc. 275, and authorities cited.

"this statute expressly confers on cities and towns, the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised is left to the discretion of the corporation, subject, however, to the general rule, that the ordinance must be reasonable. The power given in substance is to regulate, and this implies that the corporation is empowered to do all things essential to the proper exercise of the power expressly conferred." Davis v. Town of Anita, 73 Iowa 325.

In the State of Iowa, a city is given the power to grant franchises without any limitation, except that such franchise shall not extend more than twenty-five years and that no exclusive franchise shall be granted. When this law was passed, it was, and still is, the well settled rule, that "when a municipal corporation has the power to grant or refuse, in its discretion, permission to a public service company, to occupy the streets with its structures, whether such permission be called a franchise, a license, a permit, or a mere designation of the streets to be occupied, it may grant such permission, subject to such conditions as it sees fit to impose." 19 R. C. L. Page 1153, Par. 427. Of course, such conditions must not be against law or public policy.

The city having the power to grant a franchise, the right to impose conditions, is limited only by the terms of the grant of the power. Therefore it is self evident that unless other legislation, and especially section 725 of the Code of Iowa, limits the power with reference to conditions to be imposed in granting franchise,
68 a provision as to maximum rates will be binding.

Sec. 725 confers the power to "regulate and fix," but it does not specify how such power shall be exercised; and under the rule above stated, it has the power to use its own discretion as to how such power shall be exercised.

In Miller vs. City of Webster City, Iowa, 62 N. W. 648, Judge Deemer says,

"As the statute expressly confers upon the city the authority to establish markets and to provide for the weighing of commodities and contains no limitations upon the power granted, the time, manner and expediency of its exercise are left to the discretion of the corporation; and the judgment of its officers upon such matters cannot be controlled by the Courts, so long as they act within the scope of their authority, the discretion of a municipal corporation within the sphere of its powers, is as wide as that possessed by the Government of the state, subject however, to the general rule that the ordinances must be reasonable. The actions of the city Council in the exercise of expressly delegated powers cannot be questioned upon the ground that it is in conflict with public interests."

The term "regulation" is very broad. It is said that an ordinance "is not so comprehensive as 'regulation,' and is more solemn and formal than 'regulation.'" 28 Cye. 348.

Judge Shiras, in Kimball versus City of Cedar Rapids 100 Fed. 802, uses the words, "a contract regulating the rates to be charged by the company."

It ought to be a fair inference that if the legislature intended to limit the exercise of the power to "regulate and fix" to conditions expressed by ordinance that it would have so stated. We must always bear in mind in dealing with municipal problems that the powers of the municipality are not always exercised with formality and I feel that this fact is kept in mind in the enactment of legislation of cities and towns.

Of course, any contract regulating rates, must be in the nature of things, "one sided," so far as the rate is concerned. This is true because the city reserves to itself the power to change the rate at any time, subject only to the general rule that the new rate fixed
69 must be reasonable.

But I see no objections to a contract understandingly made which provides that the city shall charge a maximum rate which shall continue until such period as the same becomes unreasonable and that at such times the city reserves the right to modify the same.

Opposed to the foregoing views, counsel presents strong reasons in public policy, why the law should not be so construed. Of course, the matter of public policy can only be considered here, in an effort to construe the legislation. There are sound reasons in public policy, why the city should not be allowed to bind a corporation by a contract for a rate which does not bind itself: but there are other opposing reasons in public policy, which to my mind overcome every suggestion in support of the contention of the utilities companies. It is a matter of common knowledge that franchises are frequently granted—sometimes after spirited competition and often after bitter controversy, which franchises contain a definite provision, that, during the term of the franchise, no more than a certain sum named shall be charged for public service.

There can be no question, that heretofore, the people voting upon franchises, have believed such conditions to be valid, and I must assume that Utility Companies acquiring franchises containing such conditions, also assumed that such conditions were valid.

It is of the highest importance, that the confidence of the people in the law, and especially in the sacredness of contracts shall not be weakened. Every franchise, and every power, under legislation is construed most strongly against the grantee of a franchise. It is self evident that to now hold that conditions relating to rates solemnly agreed to are without force, would have a strong tendency to undermine the confidence of the public in the law, and would
70 have a tendency to put Utility companies under suspicion of repudiating their obligations.

There is much force in the suggestion, that regulation by contract should be permitted, especially with reference to smaller towns which cannot well afford the investigation and the trial of the question of the reasonableness of rates from time to time and I believe it would be in the interest of said communities, to have a law permit-

ting a contract binding both sides as to rates, for reasonable period of time, say, three or five years. This would stabilize conditions for the utility company in the city or town, and avoid expensive and unpleasant controversies.

It is, of course, important that Utility companies shall receive reasonable compensation for what is furnished. Upon the showing before the court, (which for the trial of this issue I assume to be true) it is apparent that some of these companies cannot continue under the contract rates, because they have no source of income, except the money received for the commodity furnished, and war conditions have radically increased the cost of production, so that a rate fixed at the time the franchise was granted a few years ago, may be utterly inadequate at the present time to pay even current expenses; but these are conditions which the court cannot relieve, as has been recently held in Columbus County against city of Columbus, 253 Fed. 499, and other cases.

(2) But there are other considerations. These cases are brought upon the claim that because the rates are confiscatory, the utility companies are deprived by the State of property, without due process of law, and that they are denied the equal protection of the law.

The fourteenth Amendment to the Constitution of the United States, provides—"nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to
71 any person within its jurisdiction, the equal protection of its laws."

The State, (and the municipality, which is an arm of the State) shall not "deprive any person," etc., At the foundation of these cases, is the problem as to whether upon the facts, the state, or the municipality, has deprived the Utility companies of property, without due process, or whether the state or municipality, is denying the "equal protection of its laws."

The Courts are ever ready to enforce the provisions of the Constitution of the United States: But in order to interfere with state or Municipal legislation, it must appear that there is some affirmative act, which constitutes the "deprivation" or the "denial," specified in Article Fourteen.

When an ordinance is passed by a city council, under authority of the state, it is an act of the state, and if it deprives one of his property without due process, or denies equal protection, the act will be enjoined, for the constitution is sacred and must, under all circumstances, be upheld.

But has the State, or the municipality, in these cases, done any act which violated the constitution, Except Insofar as such act has been consented to by the Companies?

It is fundamental that every individual constitutional right be waived.

"A person may, by his acts, or omission to act, waive a right which he may otherwise have under the provisions of a constitution; and where such acts or omissions have intervened a law will be sustained which otherwise might have been held invalid, if the party making the objection had not, by prior acts, precluded him-

self from being heard in opposition; thus a person who has participated in proceedings under a Statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality."
12 Corpus Juris, P. 769, Sec. 190, etc.,—, and cases cited.

Even in criminal cases, "those constitutional gurantees which are in the nature of personal privileges of the accused,
72 may be waived by him, and therefore he may not question the constitutionality of a statute under which he has made such a waiver." 12 Corpus Juris 774, Sec. 203.

It must be apparent that if the confiscatory rate is fixed, not by the municipality, but by the Utility Company, that the State has done no act "depriving" the company of its constitutional rights. It must likewise be apparent, that if the rate is the joint act of the Utility Company and the city if the Utility Company has consented to the rate, that it has waived the constitutional right which it might otherwise assert, and I am convinced that if a rate is fixed by agreement of the Utility company, which at the time is a reasonable rate, but which thereafter becomes confiscatory without any act of the state, but simply as a result of industrial conditions, that the prohibition of the fourteenth amendment upon the State, is not violated by the State.

This is a serious business, restraining the sovereign act of the state. There is no constitutional guarantee of compensatory rates. So far as income and profits are concerned, the Utility corporation stands exactly in the same position as the building corporation or the street improvement company. It may make money—it may lose money, but only when the state has acted affirmatively to the deprivation of reasonable income upon actual investment can constitutional guarantee be invoked; and where the Utility Company consents to the act of the state, there is not that "deprivation" or denial "which the constitution forbids."

So that I am satisfied that the Utility Companies are bound by these contracts.

I realize, of course, the hardship which this construction imposes. I realize that it is inequitable to expect a Utility company to furnish service which cannot be paid for out of the income. It may
73 not be here inappropriate to quote from the opinion in the Columbus Railway case Supra:

"It cannot be denied on the showing made, that the present war has greatly increased the cost of street railway operation. The award of the National War Labor board in the wage controversy, cannot be regarded otherwise than binding on the company, and the increase of wages granted by the company pursuant thereto, cannot, in any fair sense, be considered as its voluntary act. It is also undoubtedly true, on the showing made, that complainant cannot, under existing conditions, finance any improvements required to meet new demands for heat, light, and power, or for increased street railway

facilities, and its failure so to do must injure the interests of the defendant and its inhabitants as much as it injures the complainant.

"Prolonged operation under these conditions would seem to be a manifest impossibility, and must result in impairing the street railway service and gr-eviously harming the people and business of the city. These considerations do not, for the reasons already stated, present any ground upon which a court can grant relief, for it has power only to declare the law and apply it. A sound public policy forbids usurpation by the Courts of Governmental power lodged in other departments of the government. No power inheres in a court, either to make contracts for parties, or absolve them from the effect of their contracts, provided the parties are competent in law to contract, and no fraud intervenes in the making thereof.

In view of these well recognized limitations of the Court's power I can only suggest that the present emergency, likely as it is to become much greater in the near future, calls urgently for some kind of accommodation of temporary compromise between the parties."

Much of the controversy in these cases arises out of a misunderstanding between the companies and the people of the communities which they serve. There ought not to be any misunderstanding. The public should interest themselves sufficiently to understand definitely the viewpoint of the company, and it is not too much to hope that in these cases, where existing contracts, by virtue of war conditions, impose great hardships, that temporary arrangements may be made by which the situation may be solved for the time being.

The Record in These Cases.

These cases have been set down for trial by order of the Court, upon the issue as to the validity of the contracts. I am
74 not sure that the record is in shape to present this issue appropriate for review in the higher court. Of course, I have assumed and counsel have assumed, for the sake of this question, that the contract rates are confiscatory, but I am not sure that the record justifies this assumption.

To save any possible question, in the interest of all parties, it ought to be admitted of record, for the purpose of this hearing, that the contract rates in each individual case, are confiscatory. So important is this in my present view, that I feel that it would be necessary to take testimony upon this point unless it is handled by a stipulation.

I therefore suggest, that counsel for the plaintiffs in these cases, prepare a stipulation which they feel will make the record, and submit it to counsel for the company, and by mutual co-operation, I am satisfied that without waiving anybody else's rights, the record can be completed. In this way the matter can be presented to a higher court without much expense, and with more satisfaction in the consideration of the question involved.

After this is done, the Court will enter an order of record, and

will at that time hear counsel for the plaintiffs upon their request for a continuance of the restraining order, pending appeal. Application for such continuance to be prepared and served upon counsel as the rules of this court provide.

(Sgd.) MARTIN J. WADE,
Judge.

75 And thereafter to-wit: On the 28th day of April A. D. 1919 an order was filed in said cause granting leave to file Amended and Substituted Answer which is in words and figures as follows to-wit:

In the District Court of the United States, Southern District of Iowa, Southern Division.

4010. Equity.

SOUTHERN IOWA ELECTRIC COMPANY

vs.

CITY OF CHARITON, IOWA, et al.

Order.

Filed April 28, A. D. 1919. Wm. C. McArthur, Clerk, by John C. Hunt, Deputy.

And now on this 28th day of April, 1919, in the above entitled case, the defendants are given leave to file Amended and substituted answer.

MARTIN J. WADE,
Judge.

Entered Equity Journal #2, Page #31.

76 And thereafter to-wit: On the 28th day of April A. D. 1919 there was filed in said cause Amended and Substituted Answer which is in words and figures as follows to-wit:

77 In the District Court of the United States, Southern District of Iowa, Southern Division.

#4010. Equity.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA, and H. G. LARMIER, as Mayor, et al., Defendants.

Amended and Substituted Answer.

Filed April 28th, A. D., 1919. Wm. C. McArthur, Clerk, by John C. Hunt, Deputy.

To the Honorable Judge of the District Court of the United States in and for the Southern District of Iowa:

Comes now the defendants in the above entitled cause of action and, with leave of the court, file this Amended and Substituted Answer to the Plaintiff's Bill of Complaint and the Amendment thereto, as follows:

The defendants state:

Count I.

1. That they admit all that part of Paragraph Five of the Plaintiff's Bill of Complaint excepting only the allegation as to the costs of the plaintiff's plant; expressly admitting that the Ordinance, a copy of which is marked Exhibit "A" and attached to the plaintiff's Bill of Complaint, was duly passed by the City Council of the City of Chariton, Iowa, and approved by the city mayor upon the same having been duly ratified by the qualified electors of the city at an election held for the purpose of submitting said Ordinance, all as by law provided, and that "in accordance with the terms of the said contract with the City of Chariton" the plaintiff installed its power and electric lighting plant within the said city. That the defendants admit that the said ordinance was duly accepted by the assignor of the plaintiff herein and that said plaintiff has been furnish-
78 ing light and power to the said city and the inhabitants therein under the terms as provided for in said ordinance and for the rates as specified in Section Three of said ordinance, and that said ordinance has never been changed, amended or modified in any manner whatsoever, and said plaintiff continued to furnish said light and power to the said city and its inhabitants at the rates as provided for in said Section Three up and until the time that the order for the temporary injunction was mere herein.

2. That the said ordinance upon being duly passed and accepted as alleged in the plaintiff's Bill of Complaint, became a valid, bind-

ing and express contract obligating the said plaintiff to furnish the said light and power for the said city and its inhabitants at the time and in the manner as provided by said ordinance, which contract can not be impaired under the Constitution of the United States.

3. That the facts as set forth in the plaintiff's Bill of Complaint and amendment thereto, do not constitute a valid cause of action against the defendants or any of them and do not entitle the plaintiff to the relief demanded.

4. That at the time said ordinance was passed and accepted, and at all times since the city of Chariton, Iowa was vested by law with full power to enter into contracts fixing rates to be charged by persons, firms or corporations for its product furnished to the said city and its inhabitants; and that said rates as set out in said Section Three were fixed by mutual agreement upon the part of the said plaintiff and the City of Chariton, which agreement is binding and valid and the Court has no jurisdiction to set aside, change or modify the same.

79 5. That at the time the said franchise or ordinance was passed and accepted, said city was empowered by laws of the State of Iowa to grant to the plaintiff the use of its streets and alleys within the said city for the purpose of furnishing to the said city and its inhabitants light, power etc., and in consideration of the said grant the plaintiff by the acceptance thereof agreed and contracted with the said city and its inhabitants to furnish its product at a certain specified rate as set out at said Section Three of said ordinance, and the said city thereby became bound to comply with the agreement so made upon its part, and the said plaintiff became bound to comply with the terms of said Section Three in consideration of the said grant.

6. That the said plaintiff by reason of its act in accepting the franchise or ordinance and the benefits accruing to the plaintiff by reason thereof, has estopped iself from denying that the rates as provided for in said franchise are binding upon it.

7. That they deny that the plaintiff is entitled to earn any greater sum of money than that which it will receive in return for its product from the said city and its inhabitants, paid for at the rate and under the terms as specified in said Section Three of said ordinance.

8. That the plaintiff is bound to furnish said product to the said city and its inhabitants at the rate and under the terms as specified at Section Three of said ordinance for the full period as provided for therein unless the said ordinance shall be hereafter changed or modified by the said city of Chariton, as by law authorized or by mutual agreement between the parties thereto.

9. That they deny that there is any issue in this case involving the construction of the provisions of the United States, prohibiting

the taking of property for public use without full compensa-
80 tion therefor, viz: the Fifth and Fourteenth Amendments to the said Constitution, or the provisions prohibiting the taking of property without due process of law, viz: the said Fifth and Fourteenth Amendments to the said Constitution, or the provisions guaranteeing equal protection of the law, viz: the Fourteenth Amendment to the said Constitution. And defendants allege that under no circumstances can such provisions of the constitution or the construction thereof be involved in this issue until such time as the city of Chariton shall take some affirmative action changing or seeking to change the rates or the terms of said Section Three of the said ordinance, and therefore, the Court is without jurisdiction to grant any part of the prayer of the plaintiff's Bill of Complaint or Amendment thereto.

Count II.

1. That the defendants deny the allegation contained in paragraph V of the plaintiff's Bill of Complaint to the effect that it expended the sum of Ninety-five Thousand Nine Hundred and Eighty-eight and 15/100 Dollars in the building of a distributing system for the purpose of lighting the city of Chariton and furnishing power and light to the inhabitants thereof, and states the fact to be that if said sum of money was expended by the said plaintiff, such expenditure was made necessary in order to construct a plant to carry on plaintiff's said business of furnishing light and power to other towns and cities and to certain companies and individuals under special contracts. That the defendants are not at this time possessed of sufficient knowledge of the terms of such contracts by which the said plaintiff furnishes said lights and power to said other cities and towns and individuals and companies as to enable the defendants to set them out specifically herein and asks the court to compel the plaintiff to produce the same and show the court just what
81 part of such alleged expenditure of money was necessary for the purpose of furnishing light and power to the inhabitants of the city of Chariton, in that no injustice will be done to such inhabitants by compelling them to contribute to the expenses of lighting and furnishing power to such other cities, towns, companies and individuals.

2. That the plaintiff Company at this time and for more than a year past, has been furnishing light and power to the city of Chariton, the city of Osceola, the towns of Russell, Lucas, Woodburn, Murray and Lacona, and is also furnishing light and power to certain companies and individuals both inside and outside of the said city of Chariton, under special contracts; and that if the said plaintiff is losing any money as alleged in its Bill of Complaint, it is by reason of an inadequate rate which it procures under such special contracts or by reason of an inadequate rate paid to it by said cities or towns for its said product.

3. That the defendants deny all that part of paragraph VI of Plaintiff's Bill of Complaint excepting that part thereof which sets

out the present schedule of rates charged by the plaintiff and excepting also such a part of said paragraph VI as may be expressly herein admitted, and states the facts to be as follows: That during the month of July, 1914, the city council of the city of Chariton, being desirous of securing an adequate water supply for said city, appointed a committee of citizens of said city to investigate and report as to the best method of securing said water supply. That the said committee reported to the council that it had secured a certain proposition, in writing, from one Edwin B. Perrigo, the assignor to the plaintiff, of the date of August 10th, 1914, by the acceptance of which the city could secure the money with which to obtain
82 the said water supply, and the said committee did thereupon submit to the council said written proposition, duly signed, all of which the said council duly accepted by proper proceedings, all of which proposition and proceedings had in connection therewith are hereto attached marked Exhibit 1, that the making of such proposition and the acceptance thereof all constitute a special, legal, valid binding and express contract, under the terms of which the said Edwin B. Perrigo bound himself, his successors and assigns to furnish electricity, light and power to the said city and its inhabitants for the rates as set out in paragraph 6 of plaintiff's said bill of complaint, and that said special contract is binding at this time and the court has no jurisdiction to modify or change the same.

That at the time the said Edwin B. Perrigo made said written proposition, the city of Chariton was the owner of its electric lighting and power plant and that to induce the said city to part with the possession of the same, and transfer possession and title thereof to him, the said Edwin Perrigo not only agreed in writing to furnish the product of the light and power at the rate above referred to, but he held out and represented to the citizens of the city of Chariton, its counsel and the said citizens' committee that his said proposal would be a great saving, as he would furnish said product at a cheaper rate than the said city was furnishing the same, and that relying upon such representation, orally stated, published and made in writing, the said counsel entered into said special contract and the citizens of the said city ratified the same, and parted with their propery, towit, the said electric light & power plant and the plaintiff now retains possession of the same. That by reason of all such representations so made by the said plaintiff and so relied upon by the said council of said city and its inhabitants, the plaintiff
83 is now estopped to deny the validity of the said contract so made and also estopped to deny that it agreed to furnish electric current to the said city and its inhabitants at the rates as set forth in said section 3 of said ordinance No. 98.

4. That the defendants had no means of knowing the amount of money the plaintiff has invested in its said enterprise, the amount of capital necessary to maintain the same, the amount of its current expense, the amount of money it has in good faith borrowed and owes, or the amount of its present and past income and the defendants, therefore, deny each and every allegation contained in the plaintiff's bill of complaint in reference thereto.

5. The defendants deny that the plaintiff has ever presented to the officials of the said city any full and complete statement of its affairs, but states it has failed to present any statement excepting its conclusions, and even then it refused to leave such statement with the counsel for its examination and consideration. Defendants further state that the officer representing said claimant corporation refused to be questioned by the city officials, and that under the conditions as herein set out it is inequitable, unjust and unlawful to compel the defendants to defend this injunction suit, and under no circumstances should the issuance of an injunction be considered by the court until the plaintiff has made a full, complete and truthful statement of its financial condition as made to said city, in such a manner as will enable the said officials to determine the exact conditions.

6. That the rate established by the special contract exhibit "A", attached to plaintiff's bill of complaint, and Exhibit "1" attached to defendant's answer, is just, reasonable and adequate and
84 furnished and procures to the plaintiff a fair return on all capital invested and all expense incurred by it in supplying the individual consumer residing in the city of Chariton with electricity. That the said rate is the highest rate paid by any of the plaintiff's numerous patrons, and that if the said plaintiff is sustaining any loss, it is not because of the unreasonableness of the rate which it seeks by this action to raise, but because of loss which it sustains because of its contracts with patrons and consumers of its products outside of the city of Chariton, and that the Court appealed to has no jurisdiction, by injunction or otherwise, to compel the citizens of the city of Chariton to make up for such loss.

7. That on or about the 15th day of November 1918 the said plaintiff, without any authority whatsoever, being granted to it, arbitrarily increased the rate to the individual consumer of its products within the city of Chariton to an amount which is unreasonable, unfair and unjust, all of which is shown by a copy of its statement mailed to said consumers, attached hereto, marked Exhibit "2" and made a part hereof, which increased rate is in direct violation of the special contract herein referred to and the ordinance.

8. The defendants admit that the city of Chariton entered into the contract attached to the plaintiff's amended bill of complaint and marked Exhibit "A" which contract is also attached to the defendants Answer and marked Exhibit "1" but the defendants deny that it was the intention of the parties to the said contract that the city should be bound thereby not to use any other power it might see fit for the purpose of pumping water, and the defendants state that such contract does not bind the said city to not so use other power for the said purpose, as is alleged in paragraph four of plaintiff's bill of complaint.

85 9. That they deny all that part of paragraph five of the plaintiff's amendment to its bill of complaint which states that the plaintiff expended additional sums of money in the production of equipment for the purpose of pumping water for the city of Chariton.

10. That the issue as to whether or not the city has performed a breach of said contract for pumping water is one of law and not of equity, and that the failure of the said city to purchase current for said pumping cannot be construed as an abandonment of said ordinance contract.

That the plaintiff has a plain, speedy and adequate remedy at law if there has been any breach of the said contract, and there is no threatened injury by reason of the said alleged breach and an injunction will not lie by reason thereof.

11. That a very large portion of the tax payers of the said city are not users of electric current in their homes, but do derive benefit from the lighting of the streets and from the water plant, and that if the city is liable for a breach of contract as alleged in the said amended bill of complaint the damages due to said company should be assessed and determined in a proper court and those tax payers would then be compelled to pay their share of such damage, but that if the relief sought by the plaintiff herein should be granted by a court of equity, the burden of the payment of all of the said damage, if any, would fall upon the private consumers of current and not upon the city of Chariton and the tax payers of the said city in general.

12. That even though the issues sought to be raised by the amended bill of complaint were triable in equity, the plaintiff is not entitled to the relief demanded for the reason that the said ordinance No. 98 expressly provides in Section 3 thereof that the plaintiff shall furnish the "operating care of the pump, motor and
86 pumps and motors," and the defendants state the facts in reference to such provision to be as follows:—that after the said ordinance No. 98 and the said contract were voted upon and approved and the said Edwin Perrigo went before the City Council of the city of Chariton, Iowa, and refused to comply with the terms of the said Section 3 and furnish the operating care of the pumps and motors, and declined and refused to furnish such care for more than one pump and one motor. That at the time the said ordinance was passed and voted upon the city was operating three pumps at three separate and distinct wells, all of which was well known to the said Perrigo at the time he made the said proposal to the said city and asked for the enactment of the said ordinance. That the said city had to have said pumps operated in order to supply its citizens with water, and upon the said refusal being made by the said Perrigo, the city council, at the instance and request of the said Perrigo, passed the following resolution, of the date of September 21st, 1914.

"Resolved further that until a permanent water supply is provided by the city, that clause in ordinance No. 98 relating to operating care shall be construed to mean operating care at main or principal pumping station only."

That the said Perrigo and the plaintiff company did thereafter refuse and fail to furnish the operating care for the said cities other two pumps, and did by such act voluntarily abandon their agreement to furnish power as provided for in said ordinance and that the said Perrigo was advised at the time he refused to furnish said operating care that his action would be construed by the city as an abandonment of his said contract to furnish said power for said purpose.

87 13. That later or about a year after the said resolution as above set out was passed and the said contract to furnish power at a given rate was so abandoned by the said Perrigo, the said Plaintiff company did request the said city to use the said power to pump water with and did request the city to construct a line to its waterworks plant, and that by reason of the fact that the said plaintiff had so abandoned its said agreement, and by reason of the further fact that the city was not bound to use said power for said purpose, and by further reason of the fact that the said city determined that it could pump its water with an oil engine much cheaper than by the use of the said power, the said city refused to use the said power for the said purpose and refused to construct the said transmission line; and that upon learning the position in the matter the said plaintiff company stated to the officials of the said city that it would not insist that the city would use the said power as offered by plaintiff for the purpose of pumping water and thereby lead the said officers, the councilmen of the said city to believe that the said plaintiff had abandoned all claim that the city was bound to purchase said power of said plaintiff.

14. That the defendants expressly deny all of the allegations of paragraph six of the plaintiff's said amended bill of complaint and states the fact to be that the said written proposal and the said ordinance No. 98 and the said contract for the pumping of said water were all of them, in the language of the said Edwin Perrigo and were drawn by him, or his attorneys, and presented to the city council and the electors of the city of Chariton, and that neither the said council or the said electors took any steps to know what per cent of profit the said plaintiff company would derive by reason of the said ordinance and contracts, and that the only thing they did consider and did see was the representations of the said Perrigo that he would furnish current and power at a certain rate, that being cheaper than the citizens were paying at that time.

88 15. That the defendants deny that the city of Chariton has control or owns any particular route from the corporation line to its pumping station, as is alleged in paragraph 8 of the said amended bill of complaint, and states that the said city would have access to the public highway as does the plaintiff. That if the city

has performed a breach of contract by not constructing a line and the plaintiff has paid out any sum of money for the construction of said line by reason of such alleged breach of contract, the plaintiff's remedy is in a court of law, and for money owed to the said plaintiff by the city of Charitoa, which money if it should be found that any were in fact owed, would have to be paid out of the funds of the said city raised by general taxation against all of the property in said city, and that to sustain the plaintiff's plea in this action would result in the individual users of the product of the said plaintiff paying said money so claimed to be due by increasing the price of the product which said users purchased of said plaintiff company, all of which would be inequitable, unjust, unlawful and unreasonable.

16. That the plaintiff's plea as set forth in the amended bill of complaint is inequitable and must be dismissed for the further reason that plaintiff in said amendment only claims that the city is liable for the sum of twenty five hundred dollars per annum by reason of said breach of contract and by this action plaintiff asks that it be permitted to raise rates to an extent which will produce an additional sum over and above the rates as fixed by the contract to the extent of nine or ten thousand dollars per annum; and defendants further states that said pumping contract does not control in any manner whatsoever the rate fixed in section three of said ordinance No. 98 for the product of said plaintiff used by the individual consumers and in no event can the plaintiff be permitted to collect from such consumers ten thousand dollars to make up an alleged
89 loss of twenty five hundred dollars by reason of a plain breach of contract on the part of said city.

17. That the defendants deny each and every allegation contained in the said amended bill of complaint not herein nor heretofore admitted but without waiving any rights whatsoever to deny any and all allegations now made or which may hereinafter be made in this action or in any other, in any way relating to a claimed breach of any contract for the pumping of any water or for furnishing power to pump the same, and expressly reserving to themselves and to the said city all rights to resist said claim, the said defendants consent that, if the Court shall so direct, evidence may be submitted in the form of affidavits to prove the amount which the said plaintiff would have received per annum from the city had the said city used power furnished by said company with which to pump the said water, the defendants expressly denying that the court has the jurisdiction in this action to hear and act upon such claim and issue.

18. That the defendants are not in possession of any knowledge or information sufficient to form a belief as to the amount of capital actually invested in the plaintiff's plant within the city of Chariton, nor the amount of bonds or other indebtedness outstanding interest charges on the same, or the plaintiff's current or other expenses, earnings or losses, and the defendants therefore deny each and every allegation contained in the plaintiff's bill of complaint and amendment thereto in respect to such capital, bonds, interest charges, expenses, losses, earnings and borrowed capital.

19. That if the plaintiff is in fact losing money in any amount whatsoever in the operation of its plant within the city of Chariton, such loss is sustained by reason of mismanagement upon the part of the plaintiff and not by reason of the rates as set out in said
90 section 3 of the said ordinance, and defendants expressly deny that said section 3 in any way tends to or does work or act as a confiscation of the plaintiff's property.

20. That the defendants admit that the plaintiff asked defendants to join with them in appearing before a so called Board of Conciliation for the purpose of an adjustment of rates, and defendants state that they refused to appear before said board by reason of the fact that said board was not authorized to act in any manner in respect to the rates to be charged the city of Chariton or its inhabitants, or to act in any manner whatsoever with reference to the contract existing between the said city and the plaintiff, and for the further reason that in order to successfully meet the plaintiff on the issue which it sought to raise before the said board, the defendant city would be required to spend thousands of dollars in preparation and that no one within the said city or no officers thereof were authorized, empowered or justified to make such a useless and wasteful expenditure.

The defendants admit that the plaintiff did appear before the said Board of Conciliation and procure an order changing and raising the rates as fixed in section 3 of said ordinance but defendants allege that said change was made merely upon statements and conclusions as made to the said Board of Conciliation by plaintiff and its counsel and not upon a full hearing upon the merits of the matter, and defendants allege that said proposed rates were unfair and unreasonable and were and are in no way binding upon the said city or its inhabitants and that they do not in any way modify or effect the contract existing between said city and the plaintiff

21. That the original bill of complaint and the amendment thereto fails to state a valid cause in an action of equity, are fictitious and fraudulent and should be dismissed.

Wherefore, the defendants pray that the temporary writ of
91 injunction heretofore issued by the Court shall be dissolved and set aside and that the defendants' prayer for a permanent injunction shall be denied and that all of the relief sought by the plaintiff shall be refused.

(Sgd.) CITY OF CHARITON, IOWA,
H. G. LARIMER, *Mayor.*
J. M. KNEELAND,
C. P. CONNELL,
R. J. YENGEL,
W. P. KULL,
Members of the City Council, Defendants
J. W. KRIDLEBAUGH,
Chariton, Iowa,
Attorney

92 To W. A. Eikenberry, E. A. Anderson, A. B. Gookin, G. W. Ensley, H. B. Blanchard, and Oscar J. Isreal, committee appointed by the city council of the city of Chariton, Iowa, to invite bids for the purchase of the electric light plant now owned by said city, and to the mayor and city council of said city of Chariton:

GENTLEMEN:

Having been advised that the city of Chariton desires to sell its electric light plant and is willing to grant to the purchaser a franchise for the conducting during a term of years of an electric lighting heating and power business I hereby make and submit the following proposals:

Appended hereto, and constituting a part of, is a form of an ordinance which, when passed and approved and ratified by the mayor and city council and electors of the city of Chariton, I will accept; and upon the passage, approval, ratification, and acceptance thereof I will pay in cash to the city of Chariton the sum of sixty-five thousand dollars for all the rights, privileges and benefits granted to me or to my assigns, in, by and under said ordinance, and for all the property now constituting the electric lighting, heating and power plant of the city of Chariton, and consisting of boilers and piping, engines, generators, exciters, switch boards and all other power house equipment and supplies, and also all poles, wires, cross arms, braces, transformers, conduits, conductors, meters, or other property and supplies belonging to the transmission system of said city, and also all other property of whatsoever description, including all records and contracts, excepting the real estate pertaining to said electric plant, the electrolier posts and office furniture. The city of Chariton to grant to me or assigns free from rent or cost the possession and use of the real estate and buildings now used by it in the production of electric lights heat and power for a period of eighteen months after I or assigns become possessed of the property hereinabove described. It is understood that all property hereinabove mentioned pertaining to said electric light plant, excepting real property, electrolier posts and office furniture which may be now owned or acquired up to the time I come into possession of the plant, shall pass to me and also all records and contracts, and that I shall become possessed of all the property free from all claims or incumbrances.

I further agree to purchase meters now owned by customers of about 220 in number at a fair cash value.

I will enter into the street lighting and pumping contract hereto appended.

The expense of a special election called for the purpose of submitting the franchise ordinance to the voters will be paid by me.

I herewith enclose and deposit a certified check in the sum of five thousand ($5,000.00) dollars as an evidence of my good faith, which, when this proposition is accepted, may be retained and shall apply upon the purchase price but which shall be immediately returned to me in the event this proposition is rejected.

This proposition in order to bind me shall be accepted by the mayor and city council of said city and the street lighting and pumping contract hereto appended entered into within ten days from the date hereof, and the ordinance hereto appended shall be duly passed, approved and ratified, all as provided by law, within sixty days from the date hereof.

Respectfully submitted,

EDWIN P. PERRIGO.

93 W. A. Eikenberry, A. B. Gookin, E. A. Anderson, G. W. Ensley, O. J. Israel, H. B. Blanchard, Citizens' Committee; J. M. Kneeland, F. B. Curtis, E. F. Gasser, Electric Light Committee of the City Council.

After reading the same the following resolution was offered and was read by the clerk:

Resolution.

Be it resolved, by the city council of the city of Chariton, Iowa, that the proposal submitted by Edwin Perrigo to purchase the electric light plant of the said city of Chariton, Iowa, for the consideration of sixty-five thousand dollars ($65,000.00) and signed by Edwin B. Perrigo, and accepted and signed by the committee composed of W. A. Eikenberry, A. B. Gookin, E. A. Anderson, G. W. Ensley, O. J. Israel, and H. B. Blanchard, citizens, and J. M. Kneeland, F. B. Curtis and E. F. Gasser, members of the electric light committee of the city council of the said city of Chariton, Iowa, be and the same is hereby accepted and approved with the terms and conditions therein contained, and further that this council approves the franchise ordinance agreed upon by said Edwin B. Perrigo and the members of said committee.

J. C. SEWARD,
Mayor.

G. J. GITTINGER,
City Clerk.

A motion was made by Gasser, seconded by Kestler, that the said resolution be passed and adopted. The mayor ordered the clerk to call the roll, which was done, councilmen present and voting as follows: Kneeland, yea; Curtis, yea; Gasser, yea; Kestler, yea; Boss, absent and not voting. There being four yeas and no nays, whereupon the mayor declared the motion carried and the resolution thereby passed and adopted.

The following resolution was offered and was read by the clerk:

Resolution.

Be it resolved, by the city council of the city of Chariton, Iowa, that the Mayor and the city clerk be, and they are hereby instructed and directed to sign and execute on behalf of the said city of Chari-

ton, Iowa, a conditional contract with Edwin B. Perrigo for lighting the streets and for power for pumping the water for the said city of Chariton, Iowa, submitted by and executed by said Edwin B. Perrigo, signed by

J. C. SEWARD,
Mayor.

G. J. GITTINGER,
City Clerk.

A motion was made by Curtis, seconded by Kneeland, that the resolution be passed and adopted. The mayor ordered the clerk to call the roll, which was done, councilmen present and voting as follows: Gasser, yea; Kestler, yea; Curtis, yea; Kneeland, yea; Boss absent and not voting. There being four yeas and no nays whereupon the mayór declared the motion carried, the resolution thereby passed and adopted.

The following is a true copy of the contract referred to in the above resolution:

94 EXHIBIT 1.

Agreement—Street Lighting—Electroliers—Chariton, Iowa.

Whereas, The City of Chariton, Iowa, may sell and dispose of to Edwin B. Perrigo, his heirs, and assigns, the Electric Light property now owned by said city and the said city desires to secure a contract to light its streets and for pumping water.

Witnesseth, That the said Edwin B. Perrigo, his heirs or assigns, hereinafter known as the party of the first part and the City of Chariton, Iowa, hereinafter known as party of the second part, contract and agree each with the other, as follows:

The party of the first part, upon acquiring the electric light property now owned by the party of the second part, will furnish to said party of the second part for the purpose of lighting its streets, alleys and public places, overhead suspended hooded incandescent street lamps as are now installed, at the following rates and prices:

For sixty candle power lamps or their equivalent each per annum, $15.00. For eighty candle power lamps or their equivalent each per annum, $18.00. Lamps to be lighted from dusk to dawn each night. Said lamps and equipment to be furnished and maintained by party of the first part.

In the event of any of said lights not burning during the time required by this contract, the city shall have the right to deduct the pro-rata amount from the bill for each night such light fails to be lighted for more than three consecutive nights, after receipt by first party of written notice from the proper city official that said light is not burning.

The party of the second part agrees not to order any lamp installed at a greater distance than three hundred and fifty feet from a then existing incandescent street lamp.

For five light cluster posts as are now installed, each having one top lamp of eighty candle power, to be lighted from dusk until dawn

each night, and four bottom lights each of approximately forty-five candle power to be lighted from dusk until 11:00 o'clock each night, or the equivalent of the above in candle power, each post for the sum of $36.00 per annum, or additional post installed in the future under the same conditions, that is; the post complete to be furnished by the city and installed only by the party of the first part in the same manner as those now placed at the same price; the party of the first part to furnish all lamps and globe renewals and to paint posts once each year and keep globes clean. The posts installed under this agreement are to be maintained by said second party. Payment to be made in twelve equal monthly installments.

Pumping Rates.

Party of the first part agrees to sell to the party of the second part electric current of approximately twenty-three hundred (2300) volts and service for pumping of city water at four cents per kilowatt hour as recorded, by a meter furnished by first party to second party at its pumping station; this rate also to include the operating of second party's pump motor or motors and pump or pumps. The party of the second part agrees to pay for all supplies and repairs and to pay the rate named for electric current and service.

95 The party of the first part agrees to furnish the material for and to construct, at actual cost of material and labor, a transmission line over the most practicable route from the water pumping station of said city located without the corporate limits of said city to the city limits as now existing, and at the city limits connect said transmission line to a transmission line constructed by the party of the first part at its own expense and running within the city from the city limits as now existing to the electric generating station of the first party.

The party of the first part shall, without cost to it, have the free use, in serving other customers, of the transmission line without the city limits, as now existing.

The city agrees to pay the cost of the transmission line without the city limits, as now existing, when same is completed.

All street lights provided for in this agreement shall be placed at such points within the city limits as are designated by the city council or its representative, providing that, should the city require the relocation of any such lights after — have been once located, then said city shall pay the actual cost of labor and material necessary to the relocation of such light or lights.

This contract shall take effect and be binding on and after date when the party of the first part shall have acquired the electric property now owned by the city of Chariton, and shall continue in full force during the term of the grant by said city to the party of the first part contained in Ordinance No. 98 of said city; provided, however, that on the 30th day of September, 1919, said City may terminate this contract by giving to the party of the first part thirty days' written notice prior thereto of its intention so to do; and in the event of the giving by said city of said notice the parties hereto shall there-

upon enter into a new contract with all provisions like those herein contained except as to rates and prices, which shall be just and reasonable; and during the continuance of said grant said city shall in five years' periods after the 30th day of September 1919, that is on the 30th day of September 1924, the 30th day of September 1929, and the 30th day of September 1934, have the right to terminate any existing contract upon giving to the party of the first part thirty days' written prior notice and entering into a new contract with provisions in all particulars like those in the existing contract except as to rates and prices, which shall be just and reasonable. Unless notice is given as herein provided any existing contract shall continue in full force and effect.

In testimony whereof the parties hereto have hereunto set their respective hands in the city of Chariton, State of Iowa, on this tenth day of August, A. D. 1914.

EDWIN B. PERRIGO,
J. C. SEWARD,
Mayor of the City of Chariton, Iowa.
G. J. GITTINGER,
Clerk of the City of Chariton, Iowa.

In the presence of
F. M. WAYNICK.

96

Southern Iowa Electric Company.

EXHIBIT "2."

Chariton, Iowa, November 15, 1918.

To Our Customers:

The Southern Iowa Electric Company now finds itself unable to continue longer the rates that have been in effect in the past. These rates were considered fair, reasonable and compensatory at the time they were established, but

Conditions Have Changed.

The world war has affected all of you. It has affected us more than most because it has increased our cost of producing electricity without any attendant advance in the selling price, or increase in income. Is there a "merchant, manufacturer or jobber in Chariton who has not advanced his selling price to meet his increased cost? The baker cannot remain in business and sell bread made from $2.00 wheat at the same price he sold bread made from $1.00 wheat. The grocer cannot now profitably sell 20 pounds of sugar for $1.00 neither can the butcher sell sirloin steak at 15 cents per pound, except at a loss. Would it be reasonable to expect them to do so?

Applied to the production of electricity the same conditions prevail. There is no mystery about the business of producing and distributing electricity. Three principle things enter into the cost of producing and distributing electricity.

Coal—Supplies—Labor.

Over half the cost of producing electricity is for coal.

Price per ton before the war	$1.40
Price now per ton	3.20
Increase	129%

We will use nearly 4000 tons this year to generate electricity used in Chariton.

Supplies have increased from 50 to 200 per cent since the war Labor has increased 25 to 40 per cent.

We are selling electricity at the same price as before the war and losing money. Some loss last year—many thousand dollars this year.

To continue solvent we must either limit service or increase rates. Poor service would retard the developement of Chariton and cause great inconvenience to the public.

We feel the best interests of all concerned would be better conserved by raising rates.

Therefore, we trust, in your sense of fairness and justice and believe that you will approve of the slight necessary increase in rates hereafter announced.

Beginning with November bills and until further notice, electric rates will be:

For Residence and commercial lighting—

For the first 50 kilowatt hours used per month 15 cts per kilowatt hour.

For the next 100 kilowatt hours used per month 14 cts per kilowatt hour.

For the next 150 kilowatt hours used per month 12 cts per kilowatt hour.

97 For all excess kilowatt hours used per month 11 cts per kilowatt hour.

Minimum $1.00 per month.

For Power—

For up to 100 kilowatt hours used per month 9¾ cts per kilowatt hour.

For 101 to 301 kilowatt hours used per month 8¾ cts per kilowatt hour.

For 301 to 500 kilowatt hours used per month 7¾ cts per kilowatt hour.

For 501 to 800 kilowatt hours used per month 6¾ cts per kilowatt hour.

Minimum $1.00 per month per H. P.

An additional one-half cent per kilowatt hour will be added to the bill, same to be rebated if bill is paid on or before the 10th of the month.

After applying these rates we still lose money, but we can keep our heads above water.

Sincerely,

SOUTHERN IOWA ELECTRIC COMPANY.

P. S.—On account of being delayed in advising you of this change in rates one-half the November bill will be charged at the old rate.

98 In the District Court of the United States for the Southern District of Iowa, Southern Division.

No. 4010. Equity.

SOUTHERN IOWA ELECTRIC COMPANY, Complainant,

vs.

THE CITY OF CHARITON, IOWA, and H. G. LARIMER, as Mayor, and J. M. Kneeland, J. F. Connell, R. J. Yengel and W. F. Kull, as Members of the City Council of the City of Chariton, Iowa, Respondents.

Order Fixing Time for Hearing.

And now on June 14, 1919, it is ordered that June 25th, 1919 at ten o'clock A. M. at Iowa Cuty, Iowa, be and the same is hereby fixed as the time for making final record entries in the above cases under finding heretofore made. Also to determine whether injunctions shall stand pending appeal, and any other questions involved. Copies of this order will be sent by the clerk to counsel for all parties.

Witness my hand.

(Signed) MARTIN J. WADE,
Judge.

Endorsed: Filed June 14, 1919. Wm. C. McArthur, Clerk.

99 In the District Court of the United States, Southern District of Iowa, Southern Division.

No. 4010. Equity.

SOUTHERN IOWA ELECTRIC COMPANY

vs.

THE TOWN OF CHARITON et al.

Memorandum and Decree.

This and other cases have been under consideration for sometime, with a view, upon suggestion of the Court, that the question as to the

sufficiency of the defense pleaded and that even if the rates are confiscatory, the plaintiff is entitled to no relief because such rates were fixed by contract between the parties, could be determined without the delay and expense involved in taking testimony upon the question as to whether the rates were in fact confiscatory.

The Court has heretofore in Memorandum Opinion, expressed the view that where the rate for a public utility is fixed by contract between the city and the Utility Company, the same is binding, regardless of whether it is confiscatory, or whether it pays a fair profit upon the investment or not. The conclusion there expressed is still adhered to—the Court being satisfied that such a contract is binding, and that the rate having been fixed by agreement of the Utility Company, such company should be held to have waived any constitutional guarantee against deprivation of its property without compensation or due process of law.

The parties to these cases are now before the Court under order heretofore made, and upon answers in each of the cases, in which, in a separate count a contract rate is pleaded as a defense, and no issue is made in such separate count of the answer, upon the allegation of the plaintiff's petition that the rates are confiscatory.

100 Counsel for plaintiff and for defendants have already expressed their views that the court is without power to set the case for hearing upon this issue, and counsel for plaintiff have made a specific request that the case be set for hearing upon all the issues presented by the answer. I can conceive of no reason why the Court, satisfied that the facts pleaded in the first count of the Answer, constitute a good defense, and that under such facts the complainant is not entitled to recover, should take the time, or permit the delay and expense incident to a full hearing of the case.

Present equity rules contemplate that cases shall be heard as speedily as possible, and rule 29, in my judgment, permits the Court to set for hearing this separate issue which goes to the entire cause of action alleged in plaintiff's petition.

Doubt has been expressed as to whether—in case the Court should hold the defense to be sufficient and this holding should be reversed upon appeal, the parties would be entitled to a trial upon the other issues presented by the answer. It is my understanding that in case the Court should hold the defense sufficient, and the same should be reversed, that the Court of Appeals will remand it to this Court for further proceedings, which will leave the case open to be fully heard upon any issue then presented.

In view of these considerations, the Court enters the following Decree:

(Endorsed:) Filed July 3rd, 1919. Wm. C. McArthur, Clerk, by John C. Hunt, Deputy.

101 In the District Court of the United States, Southern District of Iowa, Southern Division

#4010. Equity.

SOUTHERN IOWA ELECTRIC COMPANY

vs.

THE TOWN OF CHARITON, IOWA et al.

Decree.

And now on this 25th day of June, 1919, in the above entitled case, the parties appearing by counsel, and the pleadings herein being presented and duly considered, it is ordered and adjudged, that this case be set down for hearing upon Count One of the Answer—the issue presented by said Count of said Answer to be first tried and determined before proceeding with any of the other defenses herein.

To this order setting the case for trial upon said separate issue, the plaintiff and defendants except. The plaintiff requests the Court to try the entire case—to appoint a Master and proceed to the termination of all of the issues in the case. This request is denied, and the plaintiff excepts.

And now on this 25th day of June, 1919, this case coming on for hearing upon the issue raised by the First Count of the Answer under the foregoing order, the Court proceeds to the trial thereof, and the evidence being introduced upon such issue, and the Court being now fully advised finds;

That the rates complained of by the plaintiff, were in fact, fixed by contract of the parties, as alleged in said Count of said answer, and that said rates are valid and binding upon the plaintiff, regardless of the claim in the plaintiff's petition that the same
102 are confiscatory, and that in view of such contract rates, the facts stated in the Bill of Complaint and amendments thereto, entitle the plaintiff to no relief; such rates being fixed by a contract binding upon the plaintiff, and that for this reason the plaintiff is not entitled to any relief herein, and its Bill of Complaint is dismissed. The plaintiff excepts.

The plaintiff makes oral request that the temporary injunction hereinbefore granted, be continued, or that additional order of injunction be issued, to be effective pending the appeal in this case, and is given leave to file written application in support of such request, and the temporary injunction and bond are continued until further orders herein. The Court reserving jurisdiction and power to make such further orders, and reserving full power upon final hearing, to make such orders as may be necessary to carry out any order of distribution of funds if the same becomes necessary under ruling of the Appel-ate Court.

(Sgd.) MARTIN J. WADE,
Judge.

Endorsed: Filed July 3rd, A. D. 1919. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

103 And thereafter to-wit: On the 15th day of August A. D. 1919 there was filed in said cause Application for Continuance of Restraining order which is in words and figures as follows to-wit:

104 In the District Court of the United States, Southern District of Iowa, Southern Division.

No. 4010. In Equity.

Filed Aug. 15, 1919. William C. McArthur, Clerk.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA; H. G. LARIMER, Mayor, and J. M Kneeland, J. P. Connell, R. J. Yengel, W. F. Kull and O. E. Lamb, as Members of the City Council of the City of Chariton, Iowa, Defendants.

Application for Order of Court for a Continuance of the Restraining Order Heretofore Issued Pending Appeal.

To the Honorable Martin J. Wade, Judge:

Your petitioner, Southern Iowa Electric Company respectfully shows the court that in the above entitled cause on the 14th day of November, 1918, upon the application of the plaintiff an order of court was entered that the defendants above named and each of them and all persons who shall have notice of said order of court, be enjoined and restrained from in any manner enforcing by civil or criminal proceedings, any of the conditions or penalties of any ordinance of the city of Chariton, purporting to fix rates to be charged by plaintiff to consumers in the city of Chariton. Said order of court was conditioned however, that the plaintiff file a bond in the penal sum of $15,000.00 assuring that the plaintiff shall repay to the users of electricity any sum or amount collected during the continuance of the injunction, over and above the amount finally determined to be reasonable and legal.

105 That the said order of court was further conditioned that plaintiff should keep an accurate account and a permanent record of the amounts paid by each person using electricity, and that the plaintiff should not charge in excess of the rates specified in said order of court.

Your petitioner further shows the court that pursuant to said order and in compliance therewith, the plaintiff furnished a bond with sureties approved by the clerk and in the penal sum of $15,000.00 and conforming to the requirements of the said order of

court and which said bond was approved on the 17th day of November, 1919.

Your petitioner further shows the court that since the entry of the order of court hereinbefore referred to and the issuance of the injunction, the plaintiff has collected from consumers of electric current in the town of Chariton, up to July 1, 1919, the sum of $32,761.20. That of the sum of money so collected the sum of $4,520.75 represents the amount collected in excess of the amount which would have accrued under the rates of the ordinance of the city of Chariton, in force during said period of time.

Your petitioner further shows the court that final decree was entered in this cause on the 25th day of June, 1919, and therefrom defendant is prosecuting an appeal to the Supreme Court of the United States. The plaintiff presents concurrently herewith its petition for appeal and assignment of errors. That it is the desire of the plaintiff to have continued the injunction heretofore granted in this cause and that the same shall not be dissolved pending the appeal and respectfully shows the court that in prosecuting this appeal the plaintiff is doing so in good faith, believing that error exists in said decree.

106 Plaintiff further shows the court that should its plea on appeal be sustained, it will suffer great and irreparable injury and loss in that the amounts that will then become due from a large number of people residing in the city of Chariton, will be so small from each that the expense of collection will exceed the amount involved.

Plaintiff tendered the giving of such security as the court may exact and the compliance with such conditions as the court in its discretion may determine to be just, equitable and proper.

Therefore, your petitioner asks that at the time of the entering the order allowing the appeal, the court shall make an order restoring and retaining the injunction heretofore ordered during the pendency of the appeal upon such terms as to bond or otherwise as the court may consider proper for security of the rights of the defendants.

EMMET TINLEY,
WILLIAM E. MITCHELL,
Attorneys for Plaintiff.

STATE OF IOWA,
Pottawattamie County, ss:

I, W. B. Roberts being first duly sworn upon oath say that I am Secty. & Treas. of the Southern Iowa Electric Company; that I am acquainted with the contents of the foregoing application and the statements contained therein are true as I verily believe. That in said application is set forth a correct statement of the moneys received from consumers of electric current in the city of Chariton from the time the temporary writ of injunction was ordered in said cause, up to the 1st day of July, 1919, and that said application correctly states the amount collected from the consumers of

107 electricity in the city of Chariton, in excess of the rates established by ordinance of said city in force during said period of time.

W. B. ROBERTS.

Subscribed in my presence and sworn to before me this 15 day of July, 1919.

JOHN P. ENGELKE,
Notary Public.

108 And thereafter to-wit: On the 15th day of August, A. D. 1919, there was filed in said cause Petition for Appeal which is in words and figures as follows to-wit:

109 In the District Court of the United States, Southern District of Iowa, Southern Division.

\# 4010. In Equity.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA; H. G. LARIMER, Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yengel, W. F. Kull and O. E. Lamb, as Members of the City Council of the City of Chariton, Iowa, Defendants.

Petition for Appeal.

Filed Aug. 15, 1919. Wm. C. McArthur, Clerk.

To the Honorable Martin J. Wade, District Judge:

The above named plaintiff The Southern Iowa Electric Company, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 25th day of June, A. D. 1919, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, stipulations, orders, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of
110 the United States sitting at Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper orders relating to the required security to be required of it, be made.

SOUTHERN IOWA ELECTRIC CO.,
By W. B. ROBERTS,
Sec'y & Treas., Petitioner for Appeal.

ISAAC E. CONGDON,
Of Omaha, Nebr.;
EMMET TINLEY,
Of Council Bluffs, Ia.;
W. E. MITCHELL,
Council Bluffs, Ia.,
Att'ys for Plaintiff.

111 And thereafter to-wit: On the same day August 15th, 1919, there was filed in said cause Assignment of Errors which is in words and figures as follows to-wit:

112 In the District Court of the United States, Southern District of Iowa, Southern Division.

In Equity.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA; H. G. LARIMER, Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yengel, W. E. Kull and O. E. Lamb, as Members of the City Council of the City of Chariton, Iowa, Defendants.

Assignment of Errors.

Filed Aug. 15, 1919. WM. C. MCARTHUR, Clerk, by John C. Hunt, Deputy.

Comes now the plaintiff in the above entitled cause, The Southern Iowa Electric Company, and files the following assignment of errors upon which it will rely in the prosecution of the appeal in the above entitled cause from the decree made by this honorable court on the 25th day of June, 1919.

I.

That the United States District Court for the Southern District of Iowa, erred in ordering and decreeing that the issue presented by Count 1 of the defendants' amended and substitued answer, be first tried and determined before proceeding with any of the defenses.

2.

That the United States District Court for the Southern District of Iowa, erred in overruling the request of plaintiff to proceed to the trial of the entire cause and to appoint a Master to take
113 the testimony upon all of the issues tendered by the petitioner for the determination of the court.

3.

That the United States District Court for the Southern District of Iowa erred in refusing to permit the introduction of evidence in this cause upon issues presented in plaintiff's bill and both counts of defendant's amended and substituted answer, thereby making it impossible to present the record of a full and complete trial upon all

of the issues tendered by the pleadings for the consideration of the court upon this appeal.

4.

That the United States District Court for the Southern District of Iowa erred in holding, concluding and decreeing that the rates specified in the ordinance adopted by the city of Chariton as the rates to be charged by plaintiff to consumers of electric current, constitute a valid and binding contract regardless of the claim of the plaintiff and appellant that such specified rates are confiscatory.

5.

That the United States District Court for the Southern District of Iowa erred in holding, concluding and decreeing that the maximum rates prescribed in the ordinance granting to the plaintiff the right to maintain and operate a system of lighting and to distribute electric current to consumers in the city of Chariton constituted a valid contract, binding plaintiff to charge rates not exceeding the rates therein prescribed for electric current furnished to consumers, for that the rates thus established by said ordinance constituted and was the exercise of a legislative power by the
114 City of Chariton, under the provisions of Section 725 of the Code of 1897 as amended.

6.

That the United States District Court for the Southern District of Iowa erred in holding, concluding and decreeing that the rates to be charged consumers for the furnishing of electric current by the defendant prescribed by ordinance authorizing plaintiff to maintain and operate an electric lighting system in the city of Chariton and to distribute current to consumers, constituted a contract binding upon plaintiff, because the city of Chariton did not possess the power to fix rates to be charged for the furnishing of electric current to consumers by contract but possessed only the power of regulating and fixing such rates in the exercise of its legislative powers.

7.

That the United States District Court for the Southern District of Iowa erred in holding, concluding and decreeing that the rates to be charged consumers of electric current prescribed in the ordinance adopted by the city of Chariton granting authority to the plaintiff to maintain and operate an electric lighting system in the city of Chariton and to distribute current to consumers did not constitute the exercise of the legislative power of said city granted by the statutes of the state of Iowa and particularly by Section 725 of the Code of 1897 and amendments thereto.

8.

The United States District Court for the Southern District of Iowa erred in holding, concluding and decreeing that the rates prescribed by the ordinance adopted by the city of Chariton limiting the charges to be made to consumers for electric current were
115 binding upon the plaintiff as a contract, even though such rates were not compensatory, for that the city of Chariton possessed only the power of regulation and control of rates as granted by Section 725 of the Code of 1897 and amendments thereto, and that such power was a continuing power.

9.

That the United States District Court for the Southern District of Iowa erred in holding, concluding and decreeing that the powers granted to cities in Iowa by the provisions of Section 725 of the Code of 1897 and amendments thereto were not legislative powers obligating the exercise thereof to the end that the rates permitted to be charged by the plaintiff to consumers should be compensatory for that the power granted by said section of the statute is a continuing power of legislation and the failure to exercise the same by increasing the rates permitted to be charged when the existing rates become non-compensatory amounts to the taking of property without compensation in violation of the Constitution.

10.

The United States District Court for the Southern District of Iowa erred in declining to hold, conclude and decree that the rates prescribed by the ordinance adopted by the city of Chariton and conceded by count 1 of its answer to be non-compensatory were subject to attack under the provisions of the Constitution of the United States, because the prescribing of such rates was an exercise of a legislative power by the city of Chariton.

11.

That the United States District Court for the Southern District of Iowa erred in holding, concluding and decreeing that the
116 facts stated in the Bill of Complaint and amendment thereto, entitled the plaintiff and appellant to no relief whatever.

EMMET TINLEY,
W. E. MITCHELL,
J. C. PRYOR, Jr.,
D. L. ROSS,
Attorneys for Appellant.

117 And thereafter to wit: On the 18th day of August, A. D. 1919 there was filed in said cause order allowing appeal which is in words and figures as follows to wit:

118 In the District Court of the United States, Southern District of Iowa, Southern Division.

In Equity.

4010. Equity.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA; H. G. LARIMER, Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yengel, W. E. Kull and O. E. Lamb, as members of the City Council of the City of Chariton, Iowa, Defendants.

Order Allowing Appeal.

Filed Aug. 18, 1918.

Wm. C. McArthur, Clerk.

Upon motion of Emmet Tinley, solicitor and counsel for plaintiff, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein be and the same is hereby allowed and that a certified transcript of the record, stipulation, orders, proceedings and documents be forthwith submitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $500.00.

Dated Aug. 18, 1919.

MARTIN J. WADE,
Judge.

Entered Equity Journal #2, page 46.

119 And thereafter to-wit: On the 15th day of August A. D. 1919 there was filed in said cause an Order continuing restraining order which is in words and figures as follows to-wit:

120 In the District Court of the United States for the Southern District of Iowa, Southern Division.

Filed Aug 15, 1919.

Wm. C. McArthur, Clerk.

No. 4010. Equity.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA et al., Defendants.

Order.

And now on this 15th day of August, 1919, the application by the plaintiff for an order of supersedeas, fixing bond and continuing injunction pending appeal having been filed and presented and submitted; and the court being now fully advised, finds that such application should be and the same is now granted, and the order restraining the defendants, heretofore entered and still in force herein shall be, and the same is continued in full force herein pending appeal, upon the following conditions.

(1) That plaintiff shall file a new bond herein, conditioned as in the original bond herein, all of such conditions to apply to the period while this case is pending upon appeal and until the case is finally disposed of, such bond to be in the sum of fifteen thousand ($15,000.00) dollars and shall be approved by the Clerk of this Court. This condition may be complied with by filing the written consent of the surety upon present bond, that such bond shall continue in full force and effect subject to all liability under this order.

(2) This Court and the Court to which appeal is taken shall have full power to order additional bond and to make any other order with reference thereto.

121 (3) The plaintiff shall prosecute appeal with diligence and this court or the court to which appeal is taken may revoke this order in case of unwarranted delay.

(4) Plaintiff shall have fifteen days in which to comply with order as to filing bond as prescribed herein.

To this order the defendants except.

(Signed) MARTIN J. WADE,
Judge.

Entered Equity Journal #2, page 45.

122 And thereafter to-wit: On the 27th day of August A. D. 1919 there was filed in said cause Bond for continuance of restraining order which is in words and figures as follows to-wit:

123 SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA, and H. G. LARIMER, as Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yengel, and W. F. Kull, as Members of the City Council of the City of Chariton, Iowa, Defendants.

Bond.

Whereas, by order of Court entered in the above entitled cause on the 14th day of November, 1918, the defendants, to-wit, the City of Chariton and H. G. Larimer, as Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yengel and W. F. Kull, as members of the city Council of the city of Chariton, Iowa, their successors in office and all other persons who shall have notice of said order be enjoined and restrained from in any manner enforcing, by civil or criminal proceedings any of the conditions or penalties of any ordinance of the city of Chariton establishing or purporting to establish rates to be charged by the plaintiff for the furnishing of electric current in the city of Chariton less than the following rates, to-wit:

For residence and commercial lighting and power for the first 50 K. W. H. used per month 15¢;

For the next 100 K. W. H. used per month 14¢;

For the next 150 K. W. H. duse per month 12¢;

124 All excess 11¢.

Minimum charge of 75¢ per month per meter. An additional charge of one half cent per K. W. H. may be entered on bill and same is to be rebated if bill is paid on or before the tenth of the month.

For electric current furnished for power up to 100 K. W. H. 9-3/4¢ per K. W. H.

101 to 300 K. W. H. 8 3/4¢;

301 to 500 K. W. H. 7 3/4¢;

501 to 800 K. W. H. 6 3/4¢;

801 to 1,000 K. W. H. Special contract. Minimum charge of 75¢ per month per meter, and,

Whereas, the plaintiff, by the terms of said order was permitted to charge and receive for electric current furnished in the city of Chariton in accordance with the above rates and has since then charged and received compensation for the furnishing of electric current in accordance with said rates, and,

Whereas, said order of Court is conditioned upon the plaintiff filing a bond in the sum of fifteen thousand ($15,000.00) dollars conditioned as required by said order, which said bond was filed, J. P. Greenshields and A. D. Annis as sureties, and,

Whereas, by decree of this Court entered on the 25th day of June, 1919, plaintiff's petition was dismissed and upon the request of plaintiff the restraining order heretofore referred to was continued upon request of plaintiff that it be permitted to file written application for

the continuance of said restraining order pending appeal to the Supreme Court of the United States, and,

Whereas, the plaintiff filed in this Court its written application for the continuance of the restraining order pending its appeal and on the 15th day of August, 1919, an order of Court was entered that the restraining order shall continue in full force pending the appeal upon the following conditions:

First. That plaintiff shall file a new bond herein, conditioned as is the original bond herein, all of such conditions to apply to the period while this case is pending upon appeal and until the case is finally disposed of, such bond to be in the sum of fifteen thousand ($15,000.00) dollars and shall be approved by the Clerk of this Court. This condition may be complied with by filing the
125 written consent of the surety upon present bond, that such bond shall continue in full force and effect subject to all liability under this order.

Second. This Court and the Court to which appeal is taken shall have full power to order additional bond and to make any other order with reference thereto.

Third. The plaintiff shall prosecute appeal with diligence and this court or the court to which appeal is taken may revoke this order in case of unwarranted delay.

Fourth. Plaintiff shall have fifteen days in which to comply with the order as to filing bond as prescribed herein.

Therefore, we, J. P. Greenshields, and A. D. Annis, sureties upon the bond for fifteen thousand ($15,000.00) dollars of the Southern Iowa Electric Company filed in this cause, pursuant to the provisions of the order of Court hereinbefore referred to, dated November 14, 1918, for the purpose of continuing said bond in force pending the appeal of plaintiff and in conformity with the order of court entered herein on the 15th day of August 1919 do hereby consent that said bond shall continue in full force and effect and subject to all liability under the order of Court of August 15, 1919.

In Testimony Whereof we have affixed our signatures and seals to the foregoing instrument this 23rd day of August, 1919.

J. P. GREENSHIELDS. [SEAL.]
A. D. ANNIS. [SEAL.]

126 STATE OF IOWA,
Pottawattamie County, ss:

We, J. P. Greenshields and A. D. Annis, being first duly sworn upon oath, each for himself says that he is a resident of Council Bluffs, Pottawattamie County, Iowa, and that he signed the foregoing instrument; that he also signed as surety the bond therein referred to and each for himself further says that he is worth in excess of the sum of thirty thousand ($30,000.00) dollars beyond the amount of his debts and that he has property in the Southern

District of Iowa of a value exceeding thirty thousand ($30,000.00) dollars beyond the amount of his debts and subject to execution.

A. D. ANNIS.
J. P. GREENSHIELDS.

Subscribed in my presence and sworn to before me by J. P. Greenshields and A. D. Annis this 23rd day of August, 1919.

JOHN P. ENGELKE,
Notary Public.

[NOTARIAL SEAL.]

Filed August 27, 1919. Wm. C. McArthur, Clerk. By Louis J. Adelman, Deputy.

127 And thereafter to-wit: On the 2nd day of September A. D. 1919 there was filed in said cause an Appeal bond which is in words and figures as follows to-wit:

128

In Equity.

SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA, H. G. LARIMER, Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yengel, W. F. Kull and O. E. Lamb, as Members of the City Council of the City of Chariton, Iowa, Defendants.

Bond on Appeal.

Know All Men by these Presents:

That we, Southern Iowa Electric Company as Principal and Wm. Arnd and H. L. Tinley as sureties of the County of Pottawattamie and State of Iowa, are held and firmly bound unto The City of Chariton, Iowa, H. G. Larimer, Mayor, and J. M. Kneeland, J. P. Connell, R. J. Yengel, W. F. Kull and O. E. Lamb, as members of the City Council of the City of Chariton, Iowa, in the penal sum of $500.00 lawful money of the United States to be paid to them and their respective executors, administrators and successors, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and each of our heirs executors and administrators by these presents, and whereas the above

129 named plaintiff Southern Iowa Electric Company has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the District Court of the United States for the Southern District of Iowa, in the above entitled cause.

Now, therefore, the condition of this obligation is such that if the above named Southern Iowa Electric Company shall prosecute its appeal to effect and answer all costs if it fail to make good its

plea, then this obligation shall be void, otherwise to remain in full force and effect.

Sealed with our seals and dated this 25th day of August, 1919.

SOUTHERN IOWA
ELECTRIC COMPANY,
By W. B. ROBERTS,
Sec'y & Treas., Principal. [SEAL.]

WM. ARND, [SEAL.]
H. L. TINLEY, [SEAL.]
Sureties.

STATE OF IOWA,
County of Pottawattamie, ss:

We, Wm. Arnd and H. L. Tinley each being first duly sworn upon oath say that we are the sureties who executed the foregoing instrument and that in the execution thereof we did so voluntarily and for the purposes set forth therein. We further say that we are residents and freeholders of the county of Pottawattamie and state of Iowa, and that we are worth in excess of the sum of $1,000.00 over and above our just debts and legal liabilities and property exempt from execution.

WM. ARND.
H. L. TINLEY.

Subscribed in my presence and sworn to before me by Wm. Arnd and H. L. Tinley this 25th day of August, 1919, and each acknowledged the execution of the foregoing instrument to be his free act and deed for the purposes therein set forth.

130

[SEAL.]

JOHN P. ENGELKE,
Notary Public.

The above bond is approved both as to sufficiency and form this 30th day of August, 1919.

(Sgd.)

MARTIN J. WADE,
Judge.

Endorsed: Filed Sept. 2, 1919. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy, 1919.

131 And thereafter to-wit: On the 15th day of September A. D. 1919 there was filed in said cause præcipe for transcript of the record which is in words and figures as follows to-wit:

132 SOUTHERN IOWA ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF CHARITON, IOWA; H. G. LARIMER, Mayor and J. M. Kneeland, C. P. Connell, R. J. Yengel, W. F. Kull and O. E. Lamb, as members of the City Council of the City of Chariton, Iowa, Defendants.

Praecipe for Transcript.

To the Clerk of the above entitled Court:

You will please prepare transcript of the record in this cause to be entered and filed in the office of the Clerk of the Supreme Court of the United States, under the appeal heretofore perfected to said court and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1st. Bill of complaint filed November 5, 1918.

2nd. Order of Court fixing time for hearing filed November 5, 1918.

3d. Memorandum entered and filed November 5, 1918.

4th. Order for injuction entered and filed November 14, 1918.

5th. Bond for temporary injunction and approval filed November 18, 1918.

6th. Answer of respondents, filed November 26, 1918.

7th. Order of court allowing the filing of Amendment to bill of complaint filed December 28, 1918.

133 8th. Amendment to bill of complaint filed December 28, 1918.

9th. Amendment to Answer filed January 13, 1919.

10th. Memorandum opinion of the Court entered and filed March 24, 1919.

11th. Order of Court Granting leave to respondent to file Amended and Substituted Answer, entered and filed April 28, 1919.

12th. Amended and Substituted Answer filed by respondent.

13. Order of Court fixing time and place for hearing filed and entered June 14, 1919.

14th. Memorandum opinion of Court and Decree entered and filed July 3, 1919.

15th. Application of complainant to continue restraining order, filed August 15, 1919.

15th. Petition for Appeal filed August 15, 1919.

17th. Assignment of errors, filed Aug. 15, 1919 (re-draft).

18th. Order of Court allowing appeal, entered and filed August 15, 1919.

19th. Order of Court continuing restraining order and allowing the filing of bond.

20th. Bond containing restraining order and approval.

21st. Bond on appeal and approval.

22nd. Citation on appeal and proof of service.

23d. Praecipe for transcript and proof of service.

24th. All opinions and orders of the court at any time entered in this cause and not listed above.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States and to be entered and filed in the office of the Clerk of the Supreme Court of the United States, at Washington, District of Columbia, within thirty days from September 3, 1919.

ISAAC E. CONGDON,
EMMET TINLEY,
WILLIAM E. MITCHELL,
JOHN C. PRYOR, JR.,
DILLON L. ROSS,
Solicitors for Appellant.

134 STATE OF IOWA,
Lucas County, ss:

I, C. C. Lyman, being first duly sworn upon oath say that I am the duly elected, qualified and acting sheriff of Lucas County, Iowa; that the within and attached Praecipe for transcript came into my hands on the 11th day of September, 1919, and I duly served the same by offering to read the same to each of the defendants hereinafter named and each waiving the reading, and delivering to each a true copy thereof, as follows, to-wit: The City of Chariton, Iowa, by service upon W. M. Householder, city clerk of said City; H. G. Larimer, named as Mayor, also Geo. Routt, Mayor succeeding H. G. Larimer, also J. M. Kneeland, J. P. Connell, R. J. Yengel, W. F. Kull, named as members of the City Council of the City of Chariton, and upon Frank Dunshee, Fred Yengel, Alf Timmons. O. E. Lamb, having removed his residence from the State of Iowa, residence unknown, members of the City Council of the City of Chariton, Iowa, succeeding C. P. Connell, R. J. Yengel, J. M. Kneeland, as such members; that the service of such Praecipe for transcript was so made by me upon each of the above named defendants on the 11th and 13th days

of September, 1919; that Joseph W. Kridlebaugh, Counsel for defendants and City Attorney for the city of Chariton is absent from the State.

C. C. LYMAN.

Subscribed in my presence and sworn to before me by the said C. C. Lyman, this 13th day of September, 1919.

GEO. A. VERNER,
Clerk Dist. Court.

Endorsed: Filed Sept. 15, 1919. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

135 UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

I, Wm. C. McArthur, Clerk of the District Court of the United States for the Southern District of Iowa hereby certify the foregoing 134 pages to contain a full, true and complete transcript of the record of the case of Southern Iowa Electric Company, Complainant, vs. The City of Chariton, Iowa, et al., Defendants No. 4010—Equity Southern Division, as called for by the praecipe for transcript *fo* the record filed in said cause September 15th, 1919 as full, true and complete as the originals thereof now on file and of record in office in the City of Creston in said District.

I further certify that I transmit herewith as part of said transcript the original citation with service thereof on defendants.

In witness whereof, I hereunto set my hand and affix the seal of said Court at office in the City of Creston in said District this 23d day of September A. D. 1919.

[Seal District Court District of Iowa.]

W. C. McARTHUR,
Clerk of Said Court.

Endorsed on cover: File No. 27,310. S. Iowa. D. C. U. S. Term No. 555. Southern Iowa Electric Company, Appellant, vs. The City of Chariton, Iowa, et al. Filed October 2d, 1919. File No. 27,310.

SUBJECT INDEX.

Page

Statement of case 1

Ordinance of City of Chariton granting Franchise 3

Specifications of Errors 16

I.

The City of Chariton, in adopting the ordinance granting the franchise in question, including therein a section prescribing the maximum rates to be charged for current furnished to consumers, exercised its legislative power to regulate, control and fix rates under the provisions of Section 725 of the 1913 Supplement to the Code of Iowa, expressed the will of the city under the conditions then existing. The city did not then possess the power to abrogate the power of government delegated to it by the legislature of the state to regulate the rates to be charged in the future under changed condiions: and did not possess the power to enter into a binding contract to fix maximum rates to be charged throughout the life of the grant 21-70

Wm. Barnes vs. The District of Columbia, 91 U. S. 540 22

The circumstances attending the adoption of the ordinance in question and analysis of the different sections thereof, presenting the basis of the authority of the city respecting each section other than Section 3 (rate section) of the ordinance.. 23

Part Section 720, Iowa Code, 1913 Supplement. 26

Part Section 775, Iowa Code 1897..... 27

Section 680, Iowa Code, 1897..... 28

Page

City of Tipton vs. Tipton L. & H. Co., 176 Ia. 224. 28

Section 725, Iowa Code, 1913 Supplement.... 29

Part Section 720, Iowa Code, 1913 Supplement. 31

Under the statutes of Iowa, the City of Chariton did not have the power to agree upon maximum rates to be charged through the life of the grant, but it possessed the continuing power to regulate, control and fix rates that should be at all times compensatory, and this power it could not abridge by contract or otherwise 32

An analysis of the legislation of the State of Iowa, delegating to municipalities powers respecting the rates to be charged by public-serving companies, presenting the history and evolution of such legislation. 34

Section 471, Iowa Code, 1873. 34

Section 473, Iowa Code, 1873. 35

Section 475, Iowa Code, 1873. 35

Chapter 11, Acts 22nd General Assembly... 38

Chapter 16, Acts 22nd General Assembly... 40

Town of Woodward vs. Iowa Ry. & L. Co., 178 N. W. 549 42

Section 720, Iowa Code, 1913, Supplement.. 43

Section 725, Iowa Code, 1913, Supplement.. 44

The Supreme Court of Iowa, construing Section 725 of the Code by unbroken line of decisions, holds that cities have not the power to fix, by contract, the maximum rates to be charged for electric current; but that the power granted is a continuing power to regulate rates, which power must not be abridged by contract. 45

Page

Independent School Dist. Lemars vs. The Lemars City W. & L. Co., 131 Ia. 14..... 45

Detroit vs. Citizens St. Ry. Co., 184 U. S. 368 46

Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517. 46

Columbus Ry. P. & L. Co. vs. City of Columbus, 249 U. S. 399 47

City of Tipton vs. Tipton L. & H. Co., 176 Ia. 224. 48

Iowa Railway & Light Co. vs. Jones Auto Co., 182 Ia. 982 49

Williams vs. Iowa Falls Electric Co., 170 N. W. 815. 53

Selkirk vs. Sioux City Gas & Elec. Co., 176 N. W. 301 55

Town of Woodward vs. Iowa Ry. & Light Co., 178 N. W. 549 56

Ottumwa Ry. & Light Co. vs. City of Ottumwa 173 N. W. 270; 178 N. W. 905..... 57

The holding of the Supreme Court of the United States in construing statutes not delegating the power to fix rates by contract, but granting the power to fix, regulate and control rates, is in accord with the declarations of the Iowa Supreme Court. 61

Home Telephone & Tel. Co. vs. Los Angeles, 211 U. S. 265 61

Milwaukee Elec. Ry. & Light Co. vs. Railroad Com. of Wis., 238 U. S. 174..... 62

Page

Where there is delegated to a city the power to make a binding contract for a rate to be charged consumers throughout the life of a franchise, the consumer becomes beneficially interested and the city could raise such rate without the consumers' consent. 67

Walton vs. Proutt, 174 S. W. 1152..... 68

Pond vs. New Rochelle, 76 N. E. 211..... 69

II.

The United States Supreme Court will, in the construction of a state statute granting powers to a municipality, follow the interpretations given to such statutes by the highest court of the state...70-82

The provisions of the Federal Constitution prohibiting state legislation impairing contracts, not involved. 72

The Federal Courts are bound by the Construction Given by the Supreme Court of Iowa upon Section 725 of the Code Respecting the Power of Cities to Fix Rates 74

Old Colony Trust Co. vs. Omaha, 230 U. S. 100 74

Claiborne Co. vs. Brooks, 111 U. S. 400..... 76

Milwaukee Elec. R. & L. Co. vs. Railroad Co., 238 U. S. 174 77

Freport Water Co. vs. Freport, 180 U. S. 587 77

Richmond vs. Smith, 82 U. S. 429 77

Burges vs. Seligman, 107 U. S. 20 78

Independent School Dist. Lemars vs. The Lemars City W. &. L. Co., 131 Ia. 14..... 81

Page

City of Tipton vs. Tipton L. & H. Co., 176 Ia. 224 82

Iowa Railway & Light Co. vs. Jones Auto Co., 182 Ia. 982 82

Williams vs. Iowa Falls Electric Co., 170 N. W. 815 82

III.

The Court Should Not Have Ordered a Submission of the Case Under Equity Rule No. 29, Upon the Issue Made by Plaintiff's Petition and Amendments in the First Count of Defendants' Answer 83

IV.

The Enforcement of Section 3 of the Ordinance Would Violate Provisions of the Federal Constitution 84

Table of Cases Cited.

I.

STATUTES OF IOWA.

Section 471, Iowa Code 1873 . . . . . 34, 36

Section 473, Iowa Code 1873 35

Section 475, Iowa Code 1873 . . . . . 27, 35

Section 680, Iowa Code 1897 28

Section 720, Iowa Code 1913 Supplement 27, 31

Part Section 720, Iowa Code 1913 Supplement 26

Section 725, Iowa Code 1913 Supplement 29

Part Section 725, Iowa Code 1897 29

Chapter 11, Acts Iowa 22nd General Assembly . . . 38

Chapter 16, Acts Iowa 22nd General Assembly 40

II.

Page

Barnes vs. The District of Columbia, 91 U. S. 540 22

Burges vs. Seligman, 107 U. S. 20 78

City of Tipton vs. Tipton L. & H. Co., 176 Ia. 224 . . . . . 28, 48

Claiborne Co. vs. Brooks, 111 U. S. 400. 76

Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517 46

Columbus Ry. P. & L. Co. vs. City of Columbus, 249 U. S. 399 47

Detroit vs. Citizens St. Ry. Co., 184 U. S. 386. 46

Freport Water Co. vs. Freport, 180 U. S. 587. . . . 77

Home Telephone & Tel. Co. vs. Los Angeles, 211 U. S. 265 61

Independent School Dist. Lemars vs. The Lemars City W. & L. Co., 131 Ia. 14 . . . . . 45, 48, 81

Iowa Railway & Light Co. vs. Jones Auto Co., 182 Ia. 982 . . . . . 49, 51, 56

Milwaukee Elec. Ry. & Light Co. vs. Railroad Com. of Wis., 238 U. S. 174 . . . . . 62, 77

Old Colony Tr. Co. vs. Omaha, 230 U. S. 100. . . . 74

Ottumwa Ry. & Light Co. vs. City of Ottumwa, 173 N. W. 270; 178 N. W. 905 57

Pond vs. New Rochelle, 76 N. E. 211 69

Richmond vs. Smith, 82 U. S. 429 77

Selkirk vs. Sioux City Gas & Elec. Co., 176 N. W. 301 55

Town of Woodward vs. Iowa Ry. & L. Co., 178 N. W. 549 . . . . . 42, 56

Walton vs. Proutt, 174 S. W. 1152 68

Williams vs. Iowa Falls Electric Co., 170 N. W. 815 53

No. 180.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

SOUTHERN IOWA ELECTRIC COMPANY,
APPELLANT,

VS.

THE CITY OF CHARITON, IOWA, ET AL.,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF IOWA.

STATEMENT OF THE FACTS.

This suit was commenced by the Southern Iowa Electric Company to enjoin the City of Chariton, Iowa, and its officers from enforcing Section 3, establishing rates for the furnishing of electric current to consumers residing in the City of Chariton upon the claim that the revenues derived from the rates thus established were non-compensatory and violative of the Constitution of

the United States. The City of Chariton and its officers appeared and filed answer in effect admitting that the rates were non-compensatory but alleging that the ordinance in question constituted a contract binding the Southern Iowa Electric Company to continue to furnish service notwithstanding the non-compensatory character of the returns.

Upon order of court the case was set down for trial upon the issue presented by Count One of the answer, as to the validity of the contracts. The District Court dismissed the suit for want of equity holding that the ordinance pleaded by the Southern Iowa Electric Company constituted a contract between the company and the City of Chariton binding the company to furnish current at the rates prescribed in the ordinance regardless of whether such rates were, in fact, confiscatory (256 Fed. Rep. 929).

The facts as they appear from the record in the cause are as follows:

For sometime preceding the granting of the franchise in the ordinance involved in this suit the City of Chariton owned and operated an electric light plant, for the purpose of furnishing current for street lighting purposes and for consumers, resident of the city. It then became necessary for the City of Chariton to make provision for an increased supply of water and being unable to finance this proposition they proposed to make sale of its electric light plant. Negotiations were then entered into between the City of Chariton and one Ed-

win B. Perrigo which resulted in Mr. Perrigo submitting to the city a proposition whereby he proposes to pay to the city the sum of $65,000.00 for the electric light plant (p. Rec. 61). Accompanying this proposition Mr. Perrigo submitted the ordinance granting to him a franchise and also submitted the form of an agreement he was willing to make with the city for lighting the streets and pumping water (p. Rec. 63-64). This proposition was accepted by the city and subsequently the ordinance in question granting a franchise to Edwin B. Perrigo was passed by the City Council of the City of Chariton and approved by the mayor and the grant was accepted by the said Perrigo as required by Section 13.

The ordinance in question, granting to Edwin B. Perrigo, the right to acquire, construct and maintain an electric light plant in the City of Chariton and employ the streets and public places for distribution of current to consumers is as follows:

Be it ordained by the Mayor and City Council of the City of Chariton:

Section 1. That Edwin B. Perrigo, his heirs and assigns, and he and his assigns are hereafter referred to as grantee, be and hereby is and are granted the right and privilege, subject to the limitations herein specified to acquire, construct, own, operate and maintain lighting, heating and power plants or works in or adjacent to the City of Chariton, County of Lucas and State of Iowa; to lay, place and maintain conduits, mains and conductors, to erect and place poles, posts, brackets, wires, transformers or other requisite fixtures or apparatus, for the supplying or transmitting of

electricity for light, heat or power, and steam or hot water for heat or other purposes, in all or any of the streets, avenues, alleys, viaducts, subways and public grounds of the City of Chariton as they are now or may hereafter be laid out or exist within the present or feture limits of the city; to acquire and hold any and all real property, easements and rights necessarily to such ends and purposes; to produce electric current for light, heat and power and distribute same, and to produce steam or hot water for heating or other purposes and distribute same through said streets, avenues, alleys, viaducts, subways and public grounds of said city; to acquire, construct, maintain and operate such plants, structures and appurtenances as are necessary for the conducting and maintaining of such light, heat and power plants, together with all machinery and appliances necessary thereto; and for these purposes the grantee shall have the right to enter upon, through or under any street, avenue, alley, viaduct, subway or public ground for the purpose of removing any pavement or sidewalk therein, or thereon, and making any and all excavations necessary for the laying of conduits, conductors and mains, erecting poles and attachments and extending same; provided that such use of streets, alleys, avenues, viaducts, subways and public grounds be made with the least possible inconvenience to the inhabitants of said city, that said exacvations be protected by barricades when necessary and be lighted at night, and that all sidewalks, pavements and excavations be replaced by and at the expense of the grantee in as good condition as nearly as possible as they were before in, and without unnecessary delay.

Sec. 2. Said conduits, mains, conductors, posts, poles, brackets, wires and other apparatus and requirements, shall be erected and placed under the supervision of the proper city official, and

when practicable shall be placed in the alleys; and shall be placed so as not to interfere with the ordinary traffic on the streets, alleys and public grounds, nor with the flow of water in the gutters; and when placed in the paved streets the grantee shall restore the paving at once to as good condition as nearly as possible as the same was in before the work was done. Should any of the posts, poles, wires, conductors or appliances, authorized hereunder, become unsafe or a menace to public safety, the city council may by resolution declare the same unsafe and order them removed. The grantee shall hold the city free and harmless from any cause of action that may arise against it by reason of negligence, carelessness or misconduct of any agents or employees of the guarantee in the erection, maintenance or operation of said plants. Nothing in this ordinance shall be construed to allow the grantee to trim the trees growing on or extending into any street, alley or public ground without first obtaining the consent of the property owner or the proper city official.

Section 3. The grantee shall sell current at rates not to exceed for monthly consumption those named in the following schedules:

Lighting Rates.

1 to 50 K. W. H. 12 cents per K. W. H.
51 to 150 K. W. H. 11 cents per K. W. H.
151 to 300 K. W. H. 9 cents per K. W. H.
301 K. W. H. and over, 8 cents per K. W. H.

Power Rates.

Up to 100 K. W. H. 9 cents per K. W. H.

101 K. W. H. and up to 300 K. W. H. 8 cents per K. W. H.

301 K. W. H. and up to 500 K. W. H. 7 cents per K. W. H.

501 K. W. H. and up to 800 K. W. H. 6 cents per K. W. H.

801 K. W. H. and up to 1,000 K. W. H. 5 cents per K. W. H.

Over 1,000 K. W. H. Special contract.

Power rates to apply on motors above two horse power.

Meters shall be read monthly and charges made therefor; and a minimum charge of seventy-five cents per month shall be made for each meter connected where readings at the prevailing rates do not equal said sum.

No meter rent shall be charged.

Street Lighting Rates.

Overhead suspended hooded incandescent street lamps; for 60 candle power lamps or their equivalent, each per annum, $15.00.

For 80 candle power lamps or their equivalent, each per annum, $18.00.

Lamps to be lighted from dusk to dawn each night.

Payment for same to be made in twelve equal monthly installments.

The grantee shall at all times furnish and maintain said lamps.

For five lamp cluster posts, as now installed, each having one top lamp or 80 candle power, to be lighted from dusk to dawn each night, and four bottom lamps, each of approximately 45 candle power, to be lighted from dusk to eleven o'clock p. m. each night or the equivalent of the above in candle power, each post per annum $36.00.

Payment for same to be made in twelve equal monthly installments.

The grantee shall furnish lamp and globe renewals for said cluster posts.

Pumping Rates.

Per kilowatt hour on meter at pumping station, 4 cents.

This rate to include operating care of pump motor or motors and pumps.

The city to pay for supplies and repairs.

Section 4. The city shall have the privilege, upon request of the proper authorities, of using, without cost to it, the poles of the grantee for the purpose of maintaining an electric fire alarm or patrol system, so long as said fire alarm or patrol system does not interfere with the efficiency of the light, heat and power service of the grantee.

Section 5. A meter shall be installed on the premises of each consumer for the purpose of measuring the amount of electric current, heat or service furnished, which meter shall be supplied by the grantee; and the grantee shall at all times have free access to said meter for the purpose of reading, testing and repairing the same. A deposit of five dollars ($5.00) for each meter installed may be required by the grantee for each consumer, which deposit will be returned when service is discontinued and the customer's bill is paid.

Section 6. Whenever any one shall move, according to law, any building of such size as to interfere with the wires, poles, equipment, the grantee shall, upon receiving twenty-four hours' written notice, temporarily remove such wires, poles or equipment, but only upon being compensated for consequent expense or damage.

Section 7. Any person who shall interfere with, cut, injure, break, deface, damage or remove any of the meters, poles, wires, fixtures, conduits, conductors or property used in connection with the business of the grantee, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined

in a sum not to exceed one hundred dollars ($100.-00).

Section 8. The grantee if so required by said city, shall install electric service for either light or power in all cases where prospective consumers guarantee to install ten sixteen candle power lamps or their equivalent where the distance does not exceed three hundred feet from any existing line of grantee. The grantee shall furnish, without cost to customers, service wires to connect on the exterior of the customer's building with the wiring of customer's premises.

Section 9. The grantee, by accepting the provisions herein granted, assumes and agrees to erect and install inside the city limits of Chariton, within eighteen months from the date of acceptance hereof, a new light and power plant of sufficient size and capacity, adequate for the city's needs, and agrees to maintain, generate and furnish therefrom all of the electric current for light, heat and power used in said city and furnish to said City of Chariton and its inhabitants current of even and steady voltage for light and power and of such quality as shall be deemed first class, in every respect suitable for the needs of Chariton. Said light and power shall be available at all times, both day and night.

Section 10. The grantee is hereby given, without cost to him, the privilege of using and occupying the grounds whereon the present plant is situated for the operation of the present plant for a period of eighteen months, during the time grantee is erecting and installing the new plant as herein provided. At the end of eighteen months, or upon completion of said new plant grantee shall vacate said grounds and remove all equipment and buildings therefrom.

Section 11. The grantee, that is, said Perrigo and his assigns, shall have and possess all and sin-

gular the rights, privileges and benefits herein granted for and during a term of twenty-five years from and after the acceptance hereof by the grantee. At the expiration of the term herein granted the city shall have, and hereby reserves, the right to purchase the plant and all of its equipment acquired, or constructed under the provisions hereof, including the entire distribution system, and all property and rights and privileges of whatsoever description belonging to the grantee, upon giving to the grantee six months' prior notice in writing of its election to purchase and by paying the actual value of all thereof in cash; said value, if not agreed upon between the city and the grantee, to be determined by disinterested and competent appraisers, sworn to ascertain said value, one to be selected by the city and one by the grantee; and in the event the two appraisers so selected cannot agree they shall select a third; and the award of two shall be the award of the appraisers. During the existence of the term herein granted the city shall not purchase electric current from others than the grantee nor construct, acquire or operate any such plant or plants as are named or contemplated herein, or for any of the purposes named herein; and this inhibition shall be and operate as an inducement to the grantee to accept the provisions of this ordinance; and upon this inhibition the grantee may always rely.

Section 12. The grantee shall make a verified statement to the City Council, once a year when demanded, showing its gross and net earnings in the operations of its business under this franchise.

Section 13. The grantee shall within ten days after the passage and approval and ratification thereof by the electors of the city of this ordinance, all as provided by law, file a written acceptance hereof with the city clerk of the city; and in the event the grantee fails so to do no rights shall vest hereunder.

Section 14. This ordinance shall take effect and be in force from and after its passage, approval and ratification as provided by law.

The City of Chariton and the said Edwin B. Perrigo then entered into a written contract for the lighting of the streets of the city (pp. Rec. 63-64). Mr. Perrigo then paid to the city the sum of $65,000.00 and there was conveyed to him the city lighting plant with all of its appurtenances. Within thirty days after Mr. Perrigo acquired the lighting plant he transferred the property and assigned all of his rights under the franchise to the Southern Iowa Electric Company. This company then commenced the re-construction of the lighting plant and at the time of the commencement of this suit had an investment in the property aggregating $330,298.66.

The company found at the time this suit was commenced that its revenues derived under the rates established by Section 3 of the ordinance in question were insufficient to pay operating expenses and made application to the City Council of the City of Chariton requesting that it exercise its power to regulate and fix rates by the establishment of a schedule of rates that would return to the company a sufficient revenue for the payment of the expense of operation and a reasonable interest upon the investment and the said City Council refused to act upon this request, claiming that the franchise constituted a contract obligating the company to continue to furnish current upon the rates prescribed by Section 3, regardless of whether the returns were compensatory.

After the issues were joined by the filing of answer by the City of Chariton and its officers the District Court, by order (p. Rec. 50) directed that the case be set down for trial before the court upon the issue as to the validity of the contract and its effect. A doubt was expressed by the court as to whether or not the record was in shape to present the issues so that the question could be determined upon the pleadings under the provisions of equity Rule 29, and suggested that for the purpose of such trial an admission be made of record that the rates established by the ordinance were confiscatory. Pursuant to this suggestion of the court, the City of Chariton and its officers filed an amended and substituted answer (pp. 52-65), in count one of which defendant pleaded its reliance upon the ordinance in question as a binding contract, notwithstanding the rates established by Section 3 were confiscatory and in relation thereto alleged that the bill of complaint and amendment do not entitle the plaintiff to the relief demanded. The Southern Iowa Electric Company in its petition and amendments alleges that it owns and operates a well equipped and modern plant for generating electric energy in the City of Chariton under the terms of the franchise granted by the city to Edwin B. Perrigo, under the date of September 21, 1914, and within thirty (30) days thereafter assigned to this company. The ordinance in question is attached to the petition and by appropriate allegation made a part of it. It is further alleged in the petition that the City of Chariton, at the time of the adoption of the ordinance in question possessed the power to regulate and fix the rates to

be charged to consumers of electrical energy for light and power purposes within the corporate limits and that the power so vested in the City of Chariton was a continuing power imposing the duty upon said city to fix and regulate the rates to be charged by the furnisher of electrical energy at such an amount and rate as should be just, giving to the furnisher a sufficient return to meet all expenses and a reasonable profit compensating as interest on invested capital represented by the value of the equipment necessarily used and useful in carrying on the business; that in the exercise of this power the City of Chariton, on the 21st day of September, 1914, adopted Section 3 of the ordinance in question, fixing the maximum rate to be charged to all consumers. The petition specifically alleges the value of the property necessarily employed in rendering the service required of the company and the expense of operation, including only items of labor, material, taxes, depreciation and interest on bonds and notes representing borrowed money and that for the year 1917, the loss of the company was $2,042.37 and that for six months during 1918 the loss to the company was $3,745.17, and that such losses would attend the future operations of the plant.

It is further alleged that the company is and will be unable to pay the interest upon its borrowed capital, which is of less value than the fair value of the necessary equipment, and that such borrowed capital is a lien upon the property secured by mortgage which provides that the indebtedness secured thereby shall become due and subject the mortgage to foreclosure and authorize the ap-

pointment of a receiver unless the interest is paid; that such expense of interest can be met only by the borrowing of additional capital thereby increasing the amount of invested capital and that the company could not lawfully exact a return upon such increased capital.

The petition further alleges the power vested in the City of Chariton as a continuing power of legislation under the laws of the State of Iowa, to establish and fix rates for current furnished to customers, such as shall compensate for the service rendered and that Section 3 of the ordinance, by reason of changed conditions, fails to return a sufficient income to meet the expense of operation and that it is, in consequence, void and its enforcement would result in taking the property of plaintiff for public uses without just compensation and would result in the taking of the company's property without due process of law and would deny to the company the equal protection of the law. That the enforcement of Section 3 of said ordinance would require the company to furnish electric current to the City of Chariton and the inhabitants thereof for lighting and power purposes at a rate insufficient to pay the expense of carrying on the business, to-wit, the cost of labor and materials necessarily employed and would fail to give plaintiff any compensation for invested capital represented in actual value of the properties necessary for the furnishing of the service.

It is further alleged that the company has 1150 customers in the City of Chariton, each of whom pay but a small amount each month and that the expense of col-

lecting a higher rate from each would cost more than the amount of the bill; that the City Council of the City of Chariton refused to amend Section 3 of said ordinance claiming that it had a valid and binding contract with the company to furnish electric current to consumers residing within the City of Chariton, regardless of whether or not the returns were compensating for the expense of rendering the service. An injunction against the enforcement of Section 3 of the ordinance referred to was asked, together with a decree declaring said section 3 of said ordinance to be null and void and for general equitable relief.

Upon the presentation of the petition of the Southern Iowa Electric Company to the court an order was entered directing that the order of court, together with a copy of the bill, should be served upon the defendants and within five (5) days they should file any objections they might have to the issuance of the injunction prayed for.

Upon the 14th day of November, 1918, an order was entered by the court (pp. Rec. 20-21), restraining the enforcement of the ordinance in question, permitting the company to charge and receive rates not exceeding specifically stated rates alleged in the petition to be only sufficient to compensate, requiring the company to keep an account of all sums collected in excess of the rates established by ordinance and to give bond conditioned for re-payment of such excess sums, in the event of a decree sustaining the ordinance rates, which bond was given and the restraining order issued.

Upon the submission of the question involved in the pleadings, pursuant to the order of court hereinbefore referred to, judgment was entered dismissing the petition of the Southern Iowa Electric Company upon the finding, by the court that the ordinance in question constituted a valid and binding contract to furnish electric service upon the rates prescribed therein notwithstanding the fact that such rates were non-compensatory and confiscating and notwithstanding the finding of the court that rates were admitted by the City of Chariton to be non-compensatory (pp. 50-69, Rec.).

SPECIFICATIONS OF ERROR.

The United States District Court for the Southern District of Iowa, entering the decree of dismissal in this cause, erred as follows:

1.

The said court erred in ordering and decreeing the issue presented by count one of the defendant's amended and substituted answer, be tried and determined before proceeding with any of the defenses.

2.

The said court erred in overruling the request of plaintiff to proceed to the trial of the entire cause and to appoint a master to take the testimony upon all of the issues tendered by the petitioner for the determination of the court.

3.

The said court erred in refusing to permit the introduction of evidence in this cause upon the issue presented in plaintiff's bill and both counts of defendant's amended and substituted answer, thereby making it impossible to present the record of a full and complete trial upon all of the issues tendered by the pleadings for the consideration of the court upon this appeal.

4.

The said court erred in holding, concluding and decreeing that the rates specified in the ordinance adopted

by the City of Chariton, as the rates to be charged by plaintiff to consumers of electric current, constitute a valid and binding contract, regardless of the claim of the plaintiff and appellant that such specified rates are confiscatory.

5.

The said court erred in holding, concluding and decreeing that the maximum rates prescribed in the ordinance granting to the plaintiff the right to maintain and operate a system of lighting and to distribute electric current to consumers in the City of Chariton, constitute a valid contract, binding the plaintiff to charge rates not exceeding the rates therein prescribed for electric current furnished to consumers, for that the rates thus established by said ordinance constituted and was the exercise of a legislative power by the City of Chariton, under the provisions of Section 725 of the Code of 1897, as amended.

6.

The said court erred in holding, concluding and decreeing that the rates to be charged consumers for the furnishing of electric current by the defendants prescribed by ordinance authorizing plaintiff to maintain and operate an electric lighting system in the City of Chariton and to distribute current to consumers, constituted a contract binding upon plaintiff, because the City of Chariton did not possess the power to fix rates to be charged for the furnishing of electric current to consumers by contract, but possessed only the power of regulating and fixing such rates in the exercise of its legislative powers.

7.

The said court erred in holding, concluding and decreeing that the rates prescribed by the ordinance adopted by the City of Chariton limiting the charges to be made to consumers for electric current, were binding upon the plaintiff as a contract, even though such rates were not compensatory, for that the City of Chariton possessed only the power of regulation and control of rates, granted by Section 725 of the Code of 1897 and amendments thereto, and that such power was a continuing power.

8.

The said court erred in holding, concluding and decreeing that the power granted to cities in Iowa by the provisions of Section 725 of the Code of 1897 and amendments thereto, were not legislative powers obligating the exercise thereof to the end that the rates permitted to be charged by the plaintiff to consumers should be compensatory, for that the power granted by said section of the statute as a continuing power of legislation and the failure to exercise the same by increasing the rates permitted to be charged when the existing rates become non-compensatory, amounts to the taking of property without compensation in violation of the constitution.

9.

The said court erred in declining to hold, conclude and decree that the rates prescribed by the ordinance adopted by the City of Chariton and conceded by count

1 of its answer to be non-compensatory, were subject to attack under the provisions of the constitution of the United States, because the prescribing of such rates was an exercise of a legislative power by the City of Chariton.

10.

The said court erred in decreeing that the maximum rates prescribed by the ordinance granting the plaintiff the right to maintain and operate a system of lighting and to distribute electric current to consumers in the City of Chariton, constituted a valid contract binding plaintiff to charge not exceeding the rates therein prescribed and that the city had the power to enter into such binding contract fixing the maximum rates to be charged for such current so furnished.

11.

The court erred in decreeing that the City of Chariton, in prescribing the maximum rates to be charged for electric current furnished to consumers in an ordinance granting a franchise and the acceptance of the grant by the assignor of appellant, constituted a binding contract fixing the rates to be charged throughout the life of the franchise even though not compensatory; and that the city had then the power to make such a contract; and that the power of the city was not limited to a continuing power of government to regulate, fix and control the rates to be charged, which could not be abrogated in any manner whatever; and that it was not the

duty of the City of Chariton to exercise this legislative power of government, when the existing rates became and were non-compensatory, to fix and establish, by a raise thereof, rates which would be compensatory.

12.

The said court erred in holding, concluding and decreeing that the facts stated in the Bill of Complaint and amendments thereto, entitled the plaintiff and appellant to no relief whatever.

I.

The City of Chariton, in adopting the ordinance granting the franchise in question, including therein a section prescribing the maximum rates to be charged for current furnished to consumers, exercised its legislative power to regulate, control and fix rates under the provisions of Section 725 of the 1913 Supplement to the Code of Iowa, expressed the will of the city under the conditions then existing. The city did not then possess the power to abrogate the power of government delegated to it by the legislature of the state to regulate the rates to be charged in the future under changed conditions; and did not possess the power to enter into a binding contract to fix maximum rates to be charged throughout the life of the grant.

The act of a state, or an arm of a state, in fixing or regulating rates to be charged by a public serving company is the exercise of a power of government. This power of government can only be exercised directly by the Supreme Legislature, or indirectly through a governing sub-division of the state exercising a power expressly delegated to it by the Supreme Legislature of the state. A municipality or any sub-division of the state can certainly exercise only such powers as are conferred upon it by express legislative enactment, or such powers as arise by necessary implication as incidental to the powers expressly granted and such other powers as are indispensable to the purpose for which the par-

ticular municipal body was created. All such powers of government, resting primarily in the people, are vested in the state under the constitution and these powers can be delegated only when the legislative enactment by the state clearly, specifically and unmistakably grants the power; or when it must necessarily be implied; or when its exercise is indispensable for the carrying out of the purposes for which the municipal sub-division was created. This principle is thoroughly recognized and is so frequently found in the opinions of the courts, analyzing the powers and duties of the municipalities, that the citation of authorities is really unnecessary.

In the case of *Wm. Barnes* v. *The District of Columbia,* 91 U. S. 540 (542) the thought is expressed with clearness and precision:

> "A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the state. The Legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality. Again; it may strip it of every power, leaving it a corporation in name only; and it may create and re-create these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the state, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the Legislature shall extend or contract the sphere of its action."

The circumstances attending the adoption of the ordinance in question and an analysis of the different sections thereof, presenting the basis of the authority of the city respecting each section other than section 3 (rate section) of the ordinance.

The history of this controversy commences with the adoption of an ordinance (p. 14 Rec.) by the City of Chariton, approved on the 21st day of September, 1914, granting to Edwin B. Perrigo and his assigns the right to acquire, maintain and operate an electric light and power plant in the City of Chariton. We believe an analysis of the different sections of this ordinance, the privileges and rights granted thereby, the obligations imposed, the authority reserved and penalties prescribed, will aid us in the construction of Section 3. We will direct the attention of the court to the sections of this ordinance, other than Section 3, at this time and refer to the statutes of Iowa in force at the time of this grant, upon which must rest the power of the city respecting the same. We will refrain from any treatment of Section 3, being the section in which maximum rates are prescribed, the real cause of the present controversy, for later consideration.

Section 1 of the ordinance, by its terms, purports to grant to said Edwin B. Perrigo and his assigns the right to acquire, maintain and operate an electric plant in the City of Chariton with distribution lines in, upon and throughout all the streets and public places of the city. This same legislative enactment, in Section 2, makes provision for the supervision by the city of the erection of all poles and wires in the streets, prohibits the erection of

poles at places that will obstruct ordinary traffic, and prescribes generally the conditions under which the distribution system shall be constructed and maintained. Section 4 (p. 16 Rec.) makes provision for the authority of the city to use the poles erected by the grantee for the wires of its electric fire alarm and patrol system. Section 5 (p. 16 Rec.) makes provision for the installation of a meter with which to measure the current, authorizing the company to exact a deposit for its security. Section 6 (p. 16 Rec.) makes provision for the temporary removal of poles and wires, obstructing the use of the streets for extraordinary though necessary purposes, such as moving buildings along these streets. Section 7 (p. 17 Rec.) declares it to be misdemeanor to cut, injure or damage the equipment, and provides a penalty for violation. Section 8 (p. 17 Rec.) directs that the grantee, when required by the city, shall install electric service where extension of transmission line is required, not exceeding 300 feet, and where the applicant will guarantee to consume a certain quantity. This section also makes provision for the connection of the customer's building with the transmission lines. Section 9 (p. 17 Rec.) makes provision for the erection of an adequate plant within eighteen months, making provision for continuous service day and night. Section 10 (p. 17 Rec.) gives to the grantee authority to use the city property, where the plant then owned by the city is located, for a period of eighteen months. Section 11 (p. 17 Rec.) makes provision for the continuance of the

grant for a period of twenty-five years, and further provides that the city may acquire the plant and establishes a method by which its value may be ascertained. This section also declares that the city shall not purchase current from others than the grantee during the period of the grant. Section 12 (p. 18 Rec.) requires that the grantee shall make a verified statement to the city council once each year, showing its gross and net earnings in the operation of the business. Section 13 (p. 18 Rec.) prescribes the time within which an acceptance of the grant shall be filed.

A careful reading of this ordinance, section by section, discloses the fact that some of the sections assume the form of contract, while others adopt the form of command and are in their nature legislative. It seems clear to us that the validity of any particular section of the ordinance must necessarily depend upon the nature of the power delegated to the city by the supreme legislature of the state. A municipality having only such powers as are conferred upon it by express legislative enactment, or such powers as arise by necessary implication as incidental to the powers expressly granted and, of course, such other powers as are indispensable to the purposes for which the grant is made, we should seek, in connection with each subject, the source of the power that will sustain the provision.

Referring, now, to Section 1 we will find the grant to Edwin B. Perrigo and his assigns to construct and maintain the electric system, while in Section 11 we find the limitation for the continuance of this grant to be twenty-

five years. At the time of the adoption of this ordinance, cities had the power to grant to private individuals the right to construct electric plants in the cities with a limitation that such grant should not exceed twenty-five years. The portion of Section 720 of the Supplement to the Code of 1913 applicable to this phase of the question is as follows:

> "Section 720. * * * They (cities) may also grant to individuals or private corporations the authority to erect and maintain such works or plants (electric light and power plants) for a term not more than twenty-five years, and may renew, amend or extend the terms of such grant; but no exclusive franchise shall be thus granted, amended, extended or renewed."

We find, therefore, in the provisions of Section 720, specific power is granted to cities in Iowa to authorize the use of the streets for the maintaining and operating of electric light and power plants. It is not questioned but that a municipality is necessarily entrusted with a duty of regulating the use of the public streets within the city in the interest of public travel. It is the duty, under the statutes of Iowa, to maintain the streets in a safe condition for general public travel, and the city is liable for damage caused by reason of the existence of obstructions. A transmission pole line, when constructed and maintained in a correct manner, is not an obstruction; but the poles might be so placed in a public street as to create a hazard and constitute a nuisapce. There then arises, certainly, by clear implication if not in fact by express grant resulting from correct construction, the power to exact, that the construction work in the streets

shall be carried on under the supervision of the city council. Clearly the conditions named in Section 1, relating to the manner of construction and maintenance of the pole line in the streets, are conditions the city would have the power to exact. This same power forms also a correct foundation for the provisions of Sec. 2, but we also have the authority in the city, under the provisions of Section 696, to exercise all necessary efforts to prevent injury and to abate nuisances.

In section 720 we observe the authority in the city to grant the use of the streets for the erection of the pole line required for the service contemplated by this ordinance. There is also granted to the cities of Iowa the power to regulate electric wires and poles, by reason of the provisions of Section 775, as follows:

> "Section 775. Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires, and the poles and other supports thereof, by general and uniform regulation, and provide the manner in which, and the places where, the same shall be placed upon, along or under the streets, roads, avenues, alleys and public places of such city or town."

This is a power of regulation and control, which when exercised, must be general and uniform. Specific authority, however, is given permitting the city to designate the places where poles may be set. It is to the interest of the city to eliminate as far as possible a duplication of pole lines, and to that end, there is sufficient authority for the condition found in Section 4, permit-

ting the city to use the poles of the grantee for its own purposes.

In Section 7 we find a penalty prescribed for acts that are declared to be criminal. A city having the power to grant the use of its streets for the necessary purposes of furnishing light to the city and light and power to the inhabitants must necessarily have the power to protect the equipment to the end that the service may be efficiently given. We need not, however, resort to the rule permitting the implication of power in order to sustain this provision. Section 680 of the Code deals with this subject and, insofar as the same is applicable to the question involved, is as follows:

> "Sec. 680. Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

The question involved has received the attention of the Supreme Court of Iowa in the case of *City of Tipton v. Tipton Light & Heating Co.*, 176 Ia. 224 (227), in which the authority to enforce obedience to the provisions in an ordinance granting a lighting franchise was sustained.

Referring, now, to Section 8 of the ordinance, we find provision for the extension of lines, the building of service lines into the property of consumers and from the street. Insofar as this section of the ordinance may be said to require the furnishing of service to prospective consumers along the pole line of the grantee, it is but a recognition of the continuing power the city possesses under Section 725 of the Code, or the immediate exercise of that power in the fixing of the rules and regulations under which such service shall be granted. The portion of Section 725 pertinent to our present inquiry is as follows:

> "Sec. 725. They (cities) shall have power to require every individual or private corporation operating such works or plant (light and power), subject to reasonable rules and regulations, to furnish any person applying therefor, along the lines of its * * * wires * * * with * * * light or power, and to supply said city or town with light or power."

It will be observed that this section of the statute grants to the municipality a continuing power to require the rendition of service, "subject to reasonable rules and regulations," to inhabitants; and the continuing power to require the furnishing of light and power to the city. No one will contend, surely, that the city could exhaust its power in either of these respects by a single exercise thereof. It is clearly the grant of a power of a continuing nature to be exercised from time to time as conditions making it necessary and proper may arise. When you look at Section 8 of the ordinance, however, and the por-

tion of that section which applies to the giving of service to the inhabitants, you will find that it deals with two phases of the subject; first, the prescribing of conditions upon which the line will be extended for patrons; and, second, the requirement that the company shall construct service lines into the property of consumers. Under the provisions of Section 725 we find a restriction upon the exercise of the power to require service to inhabitants, in that the application must be for service along the line of the public serving company. Such a restriction must be given the force it was intended to have by the Legislature. However, the general object the city has in making the grant is to provide a means whereby the inhabitants can obtain power and light. The authority for making this general grant is, as we have seen, found in Section 720 of the Code. It is quite clear, then, that the city having the power to make the grant and a correct object being to furnish the inhabitants with the service contemplated, we are authorized in implying a power to fix conditions upon which such grant shall be made, provided such conditions do not run counter to any limitation upon power. Under the specific provision of Section 725 of the Code the city cannot "abridge, by ordinance, resolution or contract," the power to require service to be rendered to inhabitants applying therefor along the lines of wires. This positive prohibition against the abridgment of this continuing power is not violated by the condition imposing the obligation for extensions.

As we have seen, Section 720 grants the power to give to private persons and corporations authority to con-

struct and maintain electric light and power systems in a city. Section 9 of the ordinance makes provision for an adequate system with service available both day and night. Certainly the power to grant authority to erect a lighting system carries with it a power to exact, as a condition, that the system installed shall be adequate to the needs of the city and its inhabitants.

Turning, now, to Section 11 of the ordinance, we find provision made for the limitation upon the period of the grant, which is in strict accord with the statute. It also provides for the acquisition of the plant by the city. Authority for this is found in Section 720 of the Code, and a portion thereof pertinent to this inquiry is as follows:

> Sec. 720. "They (cities) shall have power to purchase, establish, erect, maintain and operate within or without the corporate limits of any city or town * * * electric light or electric power plants, with all necessary * * * poles, wires, * * * and other requisites of said works or plants * * *."

We, find, therefore, that the city has the power to purchase; and that being true, it necessarily follows that the city has authority to arrange the terms upon which the purchase shall be made.

It will serve no correct purpose to go into the question of validity of the last sentence of Section 11 of the ordinance at this time. The statutes of this state specifically authorize the making of contracts for the lighting of streets and provide for the raising of revenue to meet such contracts. It is true the cities would not have the

power to abridge by contract the power given to them to acquire lighting plants. However, the making of provision for the lighting of streets is the exercise of a power of business; and whether or not there is a conflict upon this subject, respecting the last sentence in Section 11, will not profit us at this time.

The provision of Section 12 requiring the presentation of verified statements once each year, showing the gross and net earnings of a business operated under this franchise, is pertinent to a construction of Section 3, and this will be treated under the analysis of that section.

Under the statutes of Iowa, the City of Chariton did not have the power to agree upon maximum rates to be charged throughout the life of the grant, but it possessed the continuing power to regulate, control and fix rates that should be at all times compensatory and this power it could not abridge by contract or otherwise.

With these observations respecting sections of the ordinance other than Section 3, I will now direct my attention to that section of the ordinance and the questions specifically involved in the controversy. It is the contention of the City of Chariton, and with this contention the District Court of the United States felt constrained to concur, that at the time of the adoption of this ordinance, the city had authority to enter into a contract with the assignor of the Southern Iowa Electric Company, fixing the maximum rates that should be charged for service during the life of the franchise and that Section 3 of the ordinance constitutes such a contract. It is our position, that the city had not the authority to establish permanent

rates for service rendered by electric companies, by contract, but that its powers were specifically limited to a continuing power of regulation and control. It is also our position that it was not intended, by the City of Chariton, that Section 3 should constitute a contract establishing the maximum rates to be charged throughout the life of the grant and that the same is not, in fact, such a contract. It is clear that cities of Iowa have only the powers specifically granted by express legislation, or necessarily implied as incidental to the powers expressly granted, or such powers as are indispensable to the carrying out of the objects and purposes for which the city is created. For a correct determination of the question of whether or not the City of Chariton, on the 21st day of September, 1914, possessed the power to enter into a contract fixing the maximum rates to be charged, it is necessary that we look to the legislation granting powers to cities in Iowa and in force at this particular date. It is also important to view the preceding legislation upon this same subject and carry such legislation through its process of evolution and take into consideration the views expressed by our own courts upon this subject.

It is recognized that water, heat and light are essentials and that cities may be given and may receive, the authority to provide the same for the inhabitants of the municipality and for its own use. In the early days in Iowa, even the furnishing of water did not command the serious attention of the legislative powers of the state, for the reason that this necessity of life was easily acquired by the individual. It is undoubtedly, because of

this reason that legislation upon this important subject is not found in the Iowa Code until 1873. The matter of gas appears to have been more or less of a luxury, and did not receive attention until even a later date. The subject of electric current and its uses for light and power purposes did not receive attention from the Legislature of Iowa until an Act was passed by the 22nd General Assemply and approved on the 8th day of April, 1888. In Iowa the subjects of water, gas and electric current insofar as the same may be said to affect the problems under examination, are now treated together.

An analysis of the Legislation of the State of Iowa delegating to municipalities, powers respecting the rates to be charged by public serving companies, presenting the history and evolution of such legislation.

It is therefore necessary that we shall commence our inquiry with the state of the legislation upon this subject, which at the beginning, deals only with the subjects of water. In the Iowa Code of 1873, Title IV is denominated as "Relating to County, Township, Town and City Government." Chapter 10 of this title of the Code of 1873, has the following heading: "Of Cities and Incorporated Towns." The only sections found in this chapter, or any place in the Code, relating to the subject and now essential for our inquiry, are sections 471, 473 and 475, as follows:

> "Sec. 471. They shall have power to erect waterworks, or authorize the erection of the same; but no such works shall be erected or authorized until a majority of the voters of the city or town

at a general or special election of four-fifths of the members of the council or board of trustees thereof, by vote, approve the same.

Sec. 473. When the right to build and operate such works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years, and authorize such individuals or company to charge and collect from each person supplied by them with water, such water rent as may be agreed upon between said person or corporation so building said works, and said city or town; and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties.

Sec. 475. All cities and incorporated towns constructing such works are authorized to assess from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water, such water rents as may be agree upon; and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the taxes, now authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water rents hereby authorized, shall be sufficient to pay the expenses of running and operating such works, and if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water for any purpose, such city or town

shall levy each year, and cause to be collected, a special tax as provided for above sufficient to pay off such water rents so agreed to be paid to said individual or company constructing said works; *provided*, however, that said tax shall not exceed the sum of five mills on the dollar for any one year, nor shall the same be levied upon the taxable property of said city or town which lies wholly without the limits of the benefit or protection of such works, which limit shall be fixed by the city council or board of trustees each year before making said levy."

Section 471 of the Code of 1873, clearly gives to cities and towns in Iowa the power to erect water works or to authorize the erection of the same by any person or private corporation. We find in Section 473 a definite and specific grant of power to the cities of Iowa, to authorize individuals or incorporated companies to whom authority has been given by the city to construct and operate waterworks, "to charge and collect from each person supplied by them with water, such water rent *as may be agreed upon between said person or corporation so building said works, and said city or town.*" The city is also specifically authorized and empowered to *"enter into a contract with the individual or company* constructing said works, to supply said city or town with water" for any of its essential purposes. In a new and developing country, especially respecting a subject not generally recognized in that country as an essential, capital could not be induced to embark in an enterprise without an assured profit. Under such circumstances, for the new enterprise, the profit could be best assured when the in-

come might be determined from valid contracts. Iowa was the first state in the Union to recognize that the charges of a public serving company was a proper subject of regulation and control. However, in the earlier days, it recognized the necessities of the beginner in a new field and prescribed the method of contract, as the means whereby, public serving companies and individuals could receive their income. The citation of authorities presenting the views of the courts of the county upon this interesting subject are of but little importance unless we have in mind, all of the time, the particular legislation that is the subject of construction.

The sections of the Code of 1873, above referred to remained unchanged until the enactments found in the proceedings of the 22nd General Assembly. We find in Chapter 26 of the Acts of the 22nd General Assembly approved April 3, 1888, an amendment to Section 471, which struck out of the fourth and fifth lines of that section the following words: "or four-fifths of the members of the Council or Board of Trustees thereof." This amendment has but little pertinency to our present inquiry. An examination of Section 471 discloses that this amendment deals with a restriction upon the power of cities and towns to erect or authorize the erection of waterworks. In Section 471 this power originally granted to cities and towns was restricted by the provision, that it should not be exercised unless a majority of the voters authorized it or unless four-fifths of the members of the council approved it. The amendment to this section, found in Chapter 26 of the 22nd General Assembly

above referred to, left this limitation upon the power of cities so that they could not erect or authorize the erection of water works without the consent of a majority of the voters. This limitation upon the exercise of this important power has continued to remain in the legislation of this state and the manner of its exercise has, from time to time, been further regulated by legislation. The 22nd General Assembly further amended Section 471 of the Code of 1873, and also amended Sections 473 and 475 by what is known as Chapter 11, as follows:

> *Be it Enacted by the General Assembly of the State of Iowa*:
>
> Section 1. That Section 471 of the Code of 1873 be and the same is hereby amended by inserting in the first line thereof, after the word "works" the following words, "or to establish and maintain gas works, or electric light plants, with all the necessary poles, wire, burners and other requisites of said gas works or electric light plants.
>
> Sec. 2. That Sections 472, 473, 474 and 475 of the Code of 1873 shall be held to apply to the establishment and maintainance (maintenance) of gas works and electric light plants as fully as they do to the erection of water works.

This Act was approved on the 9th day of April, 1888, and became effective, under the provisions of Section 5 thereof, upon its publication which took place on the 12th day of April, 1888. It will be seen therefore that until the 12th day of April, 1888, there was not given to cities and towns in Iowa, the power to authorize the erection and maintenance of electric light plants. When we analyze Section 473 of the Code of 1873, as

amended by Chapter 11 of the Acts of the 22nd General Assembly above quoted, we find there is then given to cities and towns in Iowa the power to authorize individuals or companies "to charge and collect from each person supplied by them" with electric current, such rentals *"as may be agreed upon between them."* Thus far we find that under the legislation of Iowa there is granted to cities and towns the power to authorize the construction and maintenance of electric light plants and to authorize the person or company operating such plants *to contract with consumers and with cities* for service rendered. As throwing light upon another enactment by the 22nd General Assembly, affecting the powers of cities and towns respecting public utilities, it is interesting to observe, that it was the 22nd General Assembly of Iowa that established the Board of Railroad Commissioners and made provision for the regulation of railways, by the state. Public thought in its evolution, had by this time broken away from the old theory of the private right of a public serving company to arbitrarily fix its own tariffs, and comprehended the powers of regulation possessed by Government. Now, directing the attention again to the existing legislation respecting the powers of cities, relating to the question of rates to be collected by electric light companies, we find that up to this point all cities, regardless of size, had authority to contract with serving companies for particular rates and did not have the continuing power to regulate, fix or control rates. The 22nd General Assembly as a further expression of advancing thought in legislation, gave to cities in Iowa

of the *first class*, and cities of the *second class, "having over 7,000 inhabitants"* and all cities organized under special charters, the power to regulate, fix and control rates to be charged by electric light companies. This is found in Chap. 16 of the Acts of the 22nd General Assembly, which was approved on the 10th day of April, 1888, and went into effect, under the provisions of the Constitution, on the 4th day of July, 1888. The Act authorizes the regulation of other lines of business affecting the public and insofar as it reflects the legislative thought of that day, the entire act is interesting, but the portions thereof pertinent to our inquiry are as follows:

> *Be it Enacted by the General Assembly of the State of Iowa*:
>
> Section 1. That all cities of the first class and cities of the second class, having over 7,000 inhabitants, and cities organized under special charters in this state in addition to the powers now granted, shall have the further and additional power conferred by this Act, as follows, to-wit: * * * to regulate telegraph, telephone, electric light, district telegraph and other electric wires, and provide the manner in which, and places where the same shall be placed upon, along or under the streets and alleys of such city; to regulate the price of gas, electric light, water rates, and to regulate and fix the charges for water meters, gas meters, electric light meters, or any other device or means necessary for determining the consumption of gas, water or electric light. This shall not be construed to authorize the passage of an ordinance or resolution or the making of any contract, whereby the above powers are abridged."

This Act is entitled as "An Act granting additional powers to certain cities of the first class, and to cities organized under special charters and cities of the second class having over 7,000 inhabitants." It will also be observed in the context of section one, that by specific terms, it is intended as a grant of "additional powers." This is a clear recognition that up to the time of this enactment, cities and towns in Iowa did not have the authority therein granted, that is the authority to fix and regulate electric rates. It is also a specific recognition that up to that time the public serving company could contract with a city for permanent rates. It will thus be seen that up to July 4, 1888, all cities and towns in Iowa had authority to authorize the fixing of water rates by contracts between the furnisher and the consumer or municipality. It also appears, that from the 12th day of April, 1888, when Chapter 11 of the Acts of the 22nd General Assembly took effect, up until the 4th day of July, 1888, all cities of Iowa, regardless of classification or size, *had a right to authorize contracts between the furnisher and consumer of electric current.* It will also appear, from the foregoing legislation, that after July 4, 1888, when Chapter 16 of the 22nd General Assembly became effective, all cities of the second class having a population *of less than* 7,000 and *all towns* in Iowa could authorize the making of contracts between the furnisher and consumer of electric current, but that all cities of the *first class* and all cities of the *second class having a population of over* 7,000, had the power to regulate and control the charges to be made by the furnisher to

the consumer of electric current and that this power could not be "abridged" by contract, ordinance or otherwise.

Permit me in this connection to direct further attention to the last sentence of Chapter 16 of the Act of the 22nd General Assembly. As we have seen, this is the first legislative enactment by the State of Iowa authorizing any municipality in Iowa to *regulate the price* to be charged for electric current. The last sentence of this Act of the legislature specifically provides that the Act shall not be construed "to authorize the passage of an ordinance or resolution or the making of any contract, whereby the above powers are abridged." This clearly was intended as a limitation upon the powers granted to cities. It clearly means that all cities receiving this power should not abridge the power in any manner whatsoever. It then necessarily follows that from July 4, 1888, all cities of the first class, and all cities of the second class having a population of over 7,000 could not in any manner whatsoever abridge the power granted to them, to regulate the price to be paid for electric current. In the case of *Town of Woodward et al.* v. *Iowa Railway & Light Company*, 178 N. W. 549, this question was considered by our Supreme Court and this very point treated as follows:

> "There *was a time* in the history of our legislation when the right *to contract as to rates* was conferred by statute upon the City Council. A comparison of certain sections in the Code of 1873 with our present Section 725 is instructive on this question. * * * By Chapter 16-22d G. A. this

right of contract by the City Council *was taken away* from cities having a population of 7,000 or more, but *was still permitted* to cities of lesser population."

The foregoing outline presents the state of the legislation in Iowa upon this subject until the adoption of the Code of 1897. With the adoption of the Code of 1897, Sections 471, 473 and 475, as they appeared in the Code of 1873, together with the subsequent amendments thereof, were dropped from the Code and in consequence were repealed. All of the legislation upon this subject, in any manner affecting the question under examination, is presented in Sections 720 and 725 of the 1913 Supplement to the Code. These sections, together with all amendments in force on the 21st day of September, 1914, the time of the adoption of the ordinance in question by the City of Chariton, is presented in the following copies. We omit the portions having no application to the subject under examination.

> Section 720. They (cities and towns) shall have power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town, heating plants, water works, gas works or electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants and lease or sell the same. They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew, amend or extend the

term of such grant; but no exclusive franchise shall be thus granted, amended, extended or renewed. * * * no such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed, or amended, or contract of purchase entered into, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election.

Sec. 725. They (cities and towns) shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires or other conduits, with gas, heat, water, light or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light or power for other necessary purposes, and to regulate and fix the rent or rates for water, gas, heat and electric light or power; to regulate and fix charges for water meters, gas meters, electric light or power meters, or other devices or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution or contract."

We have carried the analysis of the legislation upon this subject with perhaps greater detail than is necessary, and yet, it has seemed to us that the history of the legislation upon this subject will aid in reaching a correct construction of existing statutes. It is now important for us to examine the opinions of the highest court of our state upon this subject.

The Supreme Court of Iowa, construing Section 725 of the Code, by unbroken line of decisions, holds that cities have not the power to fix, by contract, the maximum rates to be charged for electric current; but that the power granted is a continuing power to regulate rates, which power must not be abridged by contract.

The Supreme Court of Iowa, in construing Section 473 of the Code of 1873, held that the power given by that section authorized the fixing of a binding rate *by contract* and that a provision found in the ordinance, granting to a public serving corporation a franchise, purporting to fix maximum rates, constituted a valid and binding contract. The case of *Independent School District of Le Mars, Iowa* v. *The Le Mars City Water & Light Company et al.*, 131 Iowa, 14, deals with this question of statutory construction. In that case the ordinance was adopted on the 1st day of October, 1888. We must bear in mind that the City of Le Mars was then and ever since has been a city of the second class, having a population of less than 7,000. At the time of the passage of this ordinance the statutes of Iowa, as above indicated, *authorized cities of more than 7,000 people to regulate and fix rates*, but that cities of the second class of *less than 7,000 people had no other method of fixing rates than by contract.* In the ordinance granting to the Le Mars Company the right to maintain and operate a water system we find Section 15 which deals with rates, as follows:

> "The following shall be the maximum water rates to be charged annually by the grantee, his heirs or assigns for the use of water until changed as hereinafter provided."

Following this clause, was set forth a long schedule enumerating the maximum rates to be charged and this included the obligation to furnish school buildings with free water. In 1904 the water company declined to furnish the Independent School District with water in accordance with the terms of the ordinance and this action seeking a writ of mandamus was commenced and the water company filed a demurrer to the petition. In the opinion, the Supreme Court sets out the provisions of Section 473 of the Code of 1873, under which the grant was made and then says on page 17:

> "This statute gave the City of Le Mars the right to contract not only for water for municipal purposes, but for the rate which should be charged other consumers thereof. The express power thus granted was to be exercised by the city in the interests and for the benefit of the inhabitants of the city who might wish to become patrons of a water plant erected by an individual or a corporation, and included within its purview of consumers, whether such consumers might be individuals or corporations, secular or religious. That ordinance and its acceptance by Dunn constituted a contract binding him and the city, as stated therein, cannot be successfully questioned. *Cedar Rapids Water Company* v. *Cedar Rapids*, 118 Iowa 234."

It is not questioned but that under the provisions of Section 473 referred to, there was given the specific authority to the city to enter into a binding contract respecting rates. Statutes somewhat less specific in their directions were before the Supreme Court of the United States in the cases of *Detroit* v. *Citizen's Street Railway*, 184 U. S. 368; *Cleveland* v. *Cleveland City Railway*

Company, 194, U. S. 517; *Columbus Railway Power & Light Company* v. *City of Columbus*, 249 U. S. 399 and other cases. In all cases dealing with this phase of the subject, it is recognized that the power of the city to fix rates by contract must depend upon the statutes of the state purporting to grant power to the municipality. An examination of the statutes of Michigan and Ohio shows the authority in the city to make such contracts not seriously different, though less specific than is found in Section 473 of the Iowa Code of 1873. In the case of *Columbus Railway & Light Company* v. *Columbus*, *supra*, we find the following:

> "Whether these ordinances constituted such contracts depends upon the proper construction of the statutes of Ohio in force at the time, and the terms of the ordinance in question.
>
> It is conceded that the statutes of Ohio regulating this matter are substantially the same as those set forth in the margin of the report of the decision of this court in *Cleveland* v. *Cleveland City R. Co.*, 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756. After the consideration therein given them, it would be superfluous to state them again or to undertake to repeat the reasons which impelled the decision of the court. In the Cleveland case this court held that upon acceptance of the ordinance it became a binding contract, governed by the rates of fare authorized to be charged during the period of twenty-five years for which the ordinance ran; that the rates contracted for became binding upon the city, and could not be altered by subsequent municipal action consistently with the constitutional rights of the railway company."

In all of these cases decided by the Supreme Court of the United States, just as in the Iowa case, *Independent District of Le Mars* v. *Le Mars Light & Water Company, supra*, the statute authorized the municipality to make such a contract and the ordinance involved in them constituted a contract. We now find that since the ordinance involved in the Le Mars case was passed, the Legislature of the State of Iowa withdrew the power to make a contract respecting rates and under the provisions of Section 725 above quoted, conferred the power upon cities to regulate and fix such rates with an absolute prohibition that such powers "shall not be abridged by ordinance, resolution or contract." The very fact that there existed in this state at one time a power giving to municipal corporations authority to make contracts respecting rates and that the statute giving such power was repealed, substituting a statute authorizing the municipality to fix and regulate such rates, accompanied by the prohibition above stated, clearly indicates that the Legislature of Iowa intended there should be no mistake but that the power of municipalities to make such contracts should be withdrawn. The Supreme Court of Iowa has had occasion to pass specifically and directly upon this question in several cases.

In the case of *City of Tipton* v. *Tipton Light & Heating Company*, 176 Iowa, 224, we find the defendant appealing from a judgment of the District Court imposing a fine for violating a city ordinance, prohibiting it from charging more than the amount fixed by an ordinance for the furnishing of electric light and power.

In the opinion the court says, after quoting literally Section 725 of the Code of 1897 on page 227:

> "The right of the state to delegate to municipalities the powers therein conferred is not questioned. The right of the city to exercise these powers when delegated is not questioned. There is no claim that the provisions of the ordinance fixing the rates are unreasonable. The passage of the ordinance is a legislative act. It is presumed to be reasonable until the contrary appears. That the defendant violated the ordinance is admitted.
>
> The first question then is: Was the passage of this ordinance a fair exercise of the delegated power of the city? * * * This statute gives to cities the power of regulate and fix rates for water, gas, etc., and gives to it power to regulate and fix charges for gas meters, etc., used for determining the amount of water, gas, etc., consumed."

Again in the same opinion on page 239 we find the following:

> "A distinction must be kept in mind between the power to regulate rates and the power to contract as to rates. The regulation of rates for public service belongs to the police power of the state, and, when delegated to the city, it belongs to the police power of the city. The power to regulate has been delegated by express terms, and, under this police power, the city has a right to punish one who violates an ordinance fixing and regulating the charge to be made for public services rendered."

In the case of *Iowa Railway & Light Company* v. *Jones Auto Company et al.*, 182 Iowa 982, we find an action by the company to recover for heat furnished to a consumer. On March 27th, 1911, the City of Perry

adopted the ordinance involved in this case, granting a franchise and which ordinance contained a regulation respecting rates, as follows, on page 984:

> "Section 6. The price to be charged for electricity furnished private consumers for lighting purposes, under and by virtue of this grant, shall not exceed one cent per hour for each sixteen candle power incandescent light, or the said Perry Electric Light, Power & Heating Company, may at its option install a system of meters and the rates charged to private consumers by meter shall not be to exceed the following (Then follows schedule of rates):

In the opinion and appearing on page 985 there is set out a copy of Section 8 of this ordinance which purports to reserve unto the city the power to regulate and fix the rates prescribed in Section 6. The court adds:

> This latter (referring to Section 8 of ordinance) added nothing to Section 725 of the Code Supplement, 1913, which declares that:

The opinion then sets out in full Section 725 of Code Supplement, 1913:

On page 990 the court says:

> "The franchise granted by said ordinance was subject to the power reserved in the City Council 'to regulate and fix the rent or rate for * * * heat,' and this might not be 'abridged by ordinance, resolution or contract.' Or, as is often said, the statute necessarily is read into the franchise and forms a part of it. Appellant expresses some doubt as to the meaning of the clause last quoted. Its manifest purpose is to forestall any attempt, by ordinances or resolution of the city, or through any

contract, to permanently or for any specified time fix the compensation for services rendered or material furnished. Whatever may have been the ordinance of the city in granting a franchise, or independent thereof, or resolution of the city council, or contract with city or private parties, the power is continued in the city council to regulate and fix the rates of compensation thereafter to be exacted. The power is a continuing one, and one city council may not tie up its successors by anything it may do in the matter covered by this statute. The granting of such a franchise is by the city council, even though its approval by the electors of the municipality is essential to its validity. Section 776, Code. And the rates for service therein specified are subject to subsequent adjustment as this may be deemed expedient or necessary by the city council. That the state has power to regulate and define charges to be exacted by public utility corporations is not questioned, nor is it doubted that such power may be delegated to municipal corporations."

It may be suggested that the meaning of this prohibition against the abridgment of the right to regulate and control by contract or otherwise, has no effect upon the right to fix the rates by contract binding upon the company only, but means that the city is not thereby bound. This thought must certainly be dispelled when we comprehend the purpose and full meaning of the power to regulate and control. This power cannot be abridged in the slightest degree and the city must be left with perfect freedom to *regulate up as well as down.*

In this case of *Iowa Railway & Light Company* v. *Jones Auto Company, supra,* the court further says, on page 992:

> "The authority to regulate and fix rates of compensation is not limited to reducing these. It includes the power to increase as well, and the city council may decrease or increase as may be necessary in determining these that shall be just and reasonable. Nor is it essential that change of rates by the city council shall rest upon some additional consideration. It is enough that the law has empowered that body to regulate and fix rates to be exacted, and the conditions of the franchise, with such authority reserved, are sufficient consideration, if any were necessary. * * * The method of regulation and fixing rates is not prescribed, and this being so, it was competent for the city council to exercise in its own way the power conferred." *Merchant's Union Barb Wire Company* v. *Chicago, B. & Q. R. Co.*, 70 Iowa 105; *Slocum* v. *City of North Platte*, 192 Fed. 252.

It seems clear to me that where the statute granting power to municipality does not give the power to fix rates by a binding contract but does give the power to fix and regulate such rates with a positive prohibition against the abridgment of this power in any manner whatever, that when the city does act upon this subject, it must be construed to have so acted in the exercise of its power to fix rates. The following sentence from the opinion in the Jones Auto Company case, with the authorities cited, clearly declares the rule in Iowa, that where there is no method prescribed for the exercise of a given power by municipalities the municipality may exercise that power in its own way:

> "The method of regulation and fixing rates is not prescribed, and this being so it was competent for the city council to exercise in its own way the power conferred."

In the case at bar the City of Chariton clearly exercised this power to fix rates by the adoption of Section 3 which by its very language discloses the purpose of the city to exercise that power:

> "Section 3. The grantee shall sell current at rates not to exceed for monthly consumption those named in the following schedule:

This question was again before the Supreme Court of Iowa in the case of *Town of Williams* v. *Iowa Falls Electric Company*, 170 N. W. 815. This opinion was filed by the Supreme Court on the 17th day of February, 1919, more than a month before the memorandum opinion was filed by the learned District Judge of the United States in this case. In the Town of Williams case, the ordinance granting to the Iowa Falls Electric Company prescribed maximum rates. Before the commencement of the case, the Iowa Falls Company notified its patrons, after the city had refused to raise the rates, that it would discontinue service unless the patrons were willing to pay an increase of 10 per cent above the maximum rates fixed in the ordinance. The Town of Williams then commenced an action in the District Court of the State and a temporary injunction was issued restraining the defendant from exacting the increased rates. A motion to dissolve the writ was denied and defendant appeals. In disposing of the appeal the Supreme Court said, on page 816:

> "The power to fix rates is purely governmental and legislative. So hold *Rogers Park Company* v. *Fergus*, 180 U. S. 624; *Home Telephone Com-*

pany v. *City*, 211 U. S. 265; *Tipton* v. *Light Company*, 176 Ia. 224; 3rd Dillon Mun. Co. (5th Ed.), Section 1325, and 4 McQuillin, Mun. Cor. Sections 1729, 1913, approved in the Tipton case. The fixing of rates by ordinance is in a sense an exercise of the police power. Wherefore a fine is enforceable for violating the provisions of the ordinance. * * *

The legislature can give power to a town to contract that rates fixed shall not be changed for a stated period, but authority 'to regulate and fix' rates does not authorize such a contract. Power to make a one can be given by unmistakable grant alone—, and without such grant, no (a) contract that rates shall be unalterable is valid. That has support in *Rosecrans* v. *U. S.*, 165 U. S. 263, and in *U. S.* v. *Jackson*, 143 Fed. at pages 787, 788. * * * This is so because enforcing such a one would, in whole or in part, extinguish an undoubted governmental power. So holds *Home Telephone Company* v. *City*, 211 U. S. 265. In this case no question can arise whether the power to make such contract has been granted because section 725, Code Supplement, 1913, expressly forbids making such a contract. That is the holding in Tipton's case, 176 Ia. 224, and in *Iowa County* v. *Jones*, 164 N. W. 780. The fixing of maximum rates in a franchise ordinance is therefore not a contract that such rates may not be changed before the time stated in such ordinance has lapsed. It has been held that approval of said rates by the approval of the franchise on the part of the electors is merely an approval of the rates fixed by the franchise as rates temporarily settled with distinct understanding that the council might change these rates either upwards or downward. *Iowa County* v. *Jones*, 164 N. W. 780, so holds. To like effect is *Rogers Park Company* v. *Fergus*, 180 U. S. 624.

The next proposition urged is that something that one party may change without the consent of

the other is not a contract. To this we have to say that, in rate cases, the proposition that nothing is in the true sense a contract unless there be a reciprocal obligation, and unless the alleged contract is binding on both, has the approval of numerous decisions in the Supreme Court of the United States, those of other Federal Courts, and all courts of last resort in many of our sister states.

. Next it is urged that this is not changed by any estoppel, arising from the fact that the service company has proceeded under the franchise grant. This is held in *State* v. *Chariton Telephone Company*, 173 Iowa 497, and in many decisions of the Supreme Court of the United States and all other courts of high standing. * * *

It follows there is no occasion for unalterable rates, since all rates must at all times be reasonable, fair, adequate, and non-confiscatory—since the municipality may not use its governmental powers to confiscate, nor the service company demand excessive rates.

In the last analysis, the contention of the appellant up to this point is that no contract, no estoppel, no ordinance, no refusal to amend an ordinance, stands, or can stand, in the way of raising the rates fixed by the plaintiff to a just rate, provided defendant can establish that the rates fixed by the ordinance of plaintiff are not now just, reasonable and fairly compensatory. As has been shown this proposition is well sustained by authority."

This question was again before the Supreme Court of Iowa in the case of *Selkirk* v. *Sioux City Gas & Electric Company*, 176 N. W. 301. This was an action in equity by a consumer, commenced on behalf of himself and other consumers to enjoin defendant from putting into effect and collecting increased gas rates under

an ordinance, amending a section in the ordinance granting to the company a franchise, which fixed the maximum rates. In that case the court held that the provision in the franchise ordinance did not constitute a contract and is ruled by the case of *Iowa Railway & Light Company* v. *Jones Auto Company* case, *supra*. This question was again before the Supreme Court of Iowa in the case of *Town of Woodward, et al.* v. *Iowa Ry. & Light Company*, 178 N. W. 549. In that case a franchise was granted to Iowa Railway & Light Company by the Town of Woodward in June, 1912, authorizing it to maintain an electric light plant in the town of Woodward. Section 6 of the ordinance granting the franchise specified the rates to be charged to consumers by similar language used in our franchise. The contention involved in the case was the claim of the Town of Woodward that the ordinance granting the franchise and prescribing rates, when accepted by the company, constituted a contract binding as such. The company resisted this contention and denies that there is any power conferred by statute upon the city council to enter into contract on the subject of rates. After the court sets out literally section 725 of the Code of 1897 the following appears:

> "It will be noted from the foregoing that the legislative power to fix rates is conferred by this section upon the city council. The legislative power thus conferred is a continuing one and may not be abridged or bartered away by contract or otherwise. The same legislative power to enact rates by ordinance is a continuing power to repeal

or amend in the same manner. The power thus conferred is subject only to the constitutional limitation that the rates thus enacted shall not be confiscatory or unreasonable but shall be reasonably compensatory. There was a time in the history of our legislation when the right of contract as to rates was conferred by statute upon the city council. A comparison of certain sections in the Code of 1873 with our present section 725 is instructive on that question."

In the opinion the court sets out in full section 473 of the Code of 1873 and proceeds with the following:

"By Chapter 16, 22d G. A. this right of contract by the city council was taken away from cities having a population of 7,000 or more but was still permitted to cities of lesser population. By the revision and codification of 1897, the right of contracts as to rates for utilities of this character was entirely eliminated and the legislative power to regulate rates was conferred upon the city council in all cases. The reason for the change of method is obvious enough. Under the contract method, the rights of the public were often bartered away either ignorantly or corruptly and utility corporations became empowered, through the contractual obligations, to enforce extortionate rates. The net result of the progressive legislation is found in our present section 725 whereby it is forbidden to any existing city council to bind the city to any rate for any future time. The power of regulating the rate is always in the present city council. It must be said, therefore, that the rates fixed by section 6 of the ordinance, hereinbefore referred to, were not fixed by contract."

This question is next before the Supreme Court of Iowa in the case of *Ottumwa Railway & Light Com-*

pany v. *City of Ottumwa*, 173 N. W. 270. In that case it appears, a franchise was granted by the City of Ottumwa in 1901 to the company and in the ordinance granting the franchise there was a provision fixing a maximum rate to be charged for fares. Because of the extraordinary conditions existing during the war the company appealed to the city council of the City of Ottumwa for an increased rate and this was refused. The company then established an increased rate and commenced this action seeking an injunction to restrain the city from interfering with its purposes. The opinion filed in this case clearly sustains our contentions that city councils do not have the right to contract respecting rates and that provisions of the franchise ordinance purporting to fix an established rate is but the exercise of the power of the city and cannot be construed as a contract.

It will be observed, upon inspection of section 725 of the Code, that Street Railways are not mentioned. Because of this fact the court holds that the section of the statute referred to has no application to street railways. The court further holds that by reason of a construction of the legislation upon this subject there exists the power vested in cities to contract respecting fares to *be charged by street railways* although this power *does not exist respecting rates to be charged by other companies*. Upon a petition for rehearing the opinion appearing in the 173 N. W. page 270 is withdrawn and the case now appears to be closed with the opinion found in vol. 178 N. W. page 905. The final opinion in this

case holds that even as to street railways cities do not have the power to contract fixing permanent rates. Upon the question before us the following language appearing on page 906 is pertinent:

> "If street railway corporations were dealt with in Section 725 of the Code of 1897, it would be beyond all question that it was error to dissolve said temporary injunction on the ground upon which it was dissolved. That statute in positive terms forbids any abridgment of the right to regulate and fix charges of service corporations named in the statute, either by ordinance, resolution, or contract. No one would now contend, in the teeth of the statute prohibition, that there can be a valid contract fixing permanent rates. As to corporations named in that statute we have held repeatedly that there can be no contracting, that rates fixed for service shall not be changed. See *Tipton* v. *Light Company*, 176 Iowa, 224, 157 N. W. 844; *Selkirk* v. *Gas Company*, 176 N. W. 301. And see *San Antonio Co.* v. *City* (D. C.), 257 Fed. 467. To like effect is *Iowa Co.* v. *Jones*, 182 Iowa, 982, 164 N. W. 780. And in the last case it is held that the fixing of maximum rates in a franchise ordinance is therefore not a contract that such rates may not be changed before the time stated in such ordinance has lapsed, and that approval by the electors of rates in the franchise is merely an approval of the rates fixed by the franchise, as rates temporarily settled, with the understanding that the same might be changed either upward or downward. And see *Rogers Park Co.* v. *Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702. • • •

(a) The power to fix rates is purely governmental and legislative, and in some aspects an exercise of the police power. *Rogers* v. *Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702; *Home Tele-*

phone Co. v. *City*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; *Tipton* v. *Light Company*, 176 Iowa, 224, 157 N. W. 844; Dillon Mun. Corp. (5th Ed.) par. 1325; McQuillin Mun. Corp. par. 1729.

(b) This governmental power cannot be limited by contract, much less entirely abrogated by it, and it has no limitations, except that both parties must respectively permit and be satisfied with such rates as shall be just and reasonable *Iowa Co.* v. *Jones*, 182 Iowa, 982, 164 N. W. 780; *Tipton* v. *Light Co.*, 176 Iowa, 224, 157 N. W. 844; Abbott Municipal Corporations, par. 915, approved in the Tipton Case and *San Antonio Co.* v. *City* (D. C.), 257 Fed. 467; *City* v. *Gas Co.*, 81 App. Div. 505, 80 N. Y. Supp. 1093; *Rogers Park Co.* v. *Fergus*, 180 U. S. 624, 81 Sup. Ct. 490, 45 L. Ed. 702.

(c) That, if it were held a contract could provide for unalterable rates, its enforceability would, in whole or in part, extinguish an undoubted governmental power. *Home Telephone Co.* v. *City*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176.

In amplification it has been said that therefore there is no occasion for unalterable rates, since all rates must at all times be reasonable, fair, adequate, and non-confiscatory; that the governmental power may not be abridged by contract since the municipality may not use its governmental powers to confiscate, and, on the other hand, the service company may not demand excessive rates. *Rogers Park Co.* v. *Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702. In *City* v. *O'Connell*, 278 Ill. 606, 116 N. E. 215, the court said:

> 'No contract can be made which assumes to surrender or alienate a strictly governmental power, which is required to continue in existence for the welfare of the public.'

In fewer words the cases proceed on the general theory that it is against public policy to con-

> tract for unchanging rates; that there must be no such contract, because its enforcement might, on the one hand, fasten what proves to be an exorbitant charge upon the patrons or, on the other, prove a rate that will confiscate the property of the service corporation. While there are other lines of reasoning advanced in the authorities in the main and at the present time, the decisions run on the broad ground that public policy forbids such contracts, unless the Legislature, the ultimate judge of what is public policy, declares unmistakably that such contracts do not offend that policy. *Murray v. City*, 226 U. S. 318, 33 Sup. Ct. 107, 57 L. Ed. 239; *Ft. Smith Co. v. Ft. Smith* (D. C.), 202 Fed. 581."

The holding of the Supreme Court of the United States in construing statutes but not delegating the power to fix rates by contract, but granting the power to fix, regulate and control rates, is in accord with the declaration of the Iowa Supreme Court.

This court, however, has had occasion to pass upon the question involved in this controversy where the municipality was not possessed of the power to contract respecting rates but was possessed of the power to regulate rates. In *Home Telephone & Telegraph Company v. Los Angeles*, 211 U. S. 265, the cases on both sides of this problem are reviewed. Permit us to present the following quotation from this case:

> (276) It is urged that though authority to contract for the maintenance of rates is not expressed in the Act, it is necessarily implied from these provisions. But we are of the opinion that there is no such necessary implication, even if anything less than a clear and affirmative expression

would be a sufficient foundation upon which to rest an authority of this nature. The decisions of this court, upon which the appellant relies, where a contract of this kind was found and enforced, all show unmistakable legislative authority to enter into the contract.

On page 274 appears the following:

"The facts in this case which seem to us material upon the questions of authority of the city to contract for rates to be maintained during the term of the franchise are as follows: The charter gave to the Council the power 'by ordinance * * * to regulate telephone service * * * and use the telephones within the city * * * and to fix and determine the charges for telephones and telephone service and connections.'

This is an ample authority to exercise the Governmental power or regulating charges, but it is no authority to enter into a contract to abandon the Governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' It authorized the exercise of the governmental power and nothing else. We find no other provision in the charter which, by any possibility, can be held to authorize a contract upon this important and vital subject."

In the case of *Milwaukee Electric Railway & Lt. Co.* v. *Railroad Commissioner of Wisconsin*, 238 U. S. 174, there is a very clear statement of this rule follow-

ing the announcement in the Home Telephone & Telegraph case:

> "The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed. The principle involved was well stated by Mr. Justice Moody in *Home Teleph. & Teleg. Co.* v. *Los Angeles*, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50."

A consumer may contend that this provision in the ordinance establishing maximum rates amounts to a contract on behalf of the company in consideration of the grant, that it will at no time charge in excess of the rates prescribed therein. To sustain this position and to maintain that such constitutes a valid contract he must take the further position that this would not prevent the city from exercising its governmental power to regulate the rates. If his position is true, however, and the city in the exercise of this power deemed it for the best interest of the city that the rates should *be raised*, yet the company could not obey such command of the city because it agreed it would never charge in excess of the pre-

scribed rate. It then necessarily follows that to adopt the construction that Section 3 of this ordinance constitutes a contract binding upon this company, the effect is to abridge the right of the city to regulate the rates by prescribing a raise thereof. In this connection we must bear in mind that the prohibitions found in Section 725 of the Code is that this power to regulate and fix rates "shall *not be abridged* by ordinance, resolution or contract." Certainly any construction that restricts the exercise of this power in any way the duly authorized legislative department of the city might deem to be best, must be treated as an abridgment and consequently within the prohibitions of the statute.

This power of government delegated to municipalities, is with the view that its exercise shall be for and in the interest of the people and the property within the city. When this power is exercised the municipality must necessarily affect both the rights of persons and the rights of property. The exercise of this power will permit the collection of tolls which is akin to the levying of a tax. Such power must therefore be exercised with a view that there shall be taken from the customer, pursuant to the exercise of this power, only a just toll which is compensated for by the service rendered. At the same time the exercise of this power by the municipality fixes the compensation that the public serving company shall receive for its property delivered to another. This involves also the exercise of a power of government that in the effect amounts to taking the property of another. It then necessarily follows that the city must, in its ex-

ercise of this power, take from the public serving company its property only upon just, fair and equitable terms, producing just and reasonable compensation. It seems clear to me that a municipality vested with this high prerogative of government must exercise it as a sacred trust. All authorities agree that this power is a continuing power and when we bear in mind the sacred character of the trust reposed, we may clearly see that it is the duty of the city to exercise that power and lower the rates when such is the correct procedure and that it is clearly the duty of the city to raise the rates when such would be the just and correct course. It then necessarily follows that any construction that would affect the right of the city to raise the rates would be an abridgment of the rights conferred.

The language of Section 3 indicates clearly the purpose upon the part of the City of Chariton in adopting the same as a part of the ordinance, to exercise its power to regulate the maximum rates to be charged in accordance with the opinion of the city based upon existing conditions. The language employed is that of command, its phraseology is legislative in character. In this connection we should have in mind the provisions of Section 12 of the ordinance. It will be observed, by the terms of this section, that it requires the grantee to furnish verified statements to the City Council of the City of Chariton once each year when demanded, showing the gross and the net earnings of the grantee in the operation of the business. The object of this section is to make provision for keeping the City of Chari-

ton informed at regular intervals of the exact income the company obtains in the operation of its business. The income received by the company is through collections made by it for service rendered under the rates prescribed by the city. There could be no possible object in the City of Chariton keeping informed as to this income, except for the purpose of enabling such city to exercise, at such time as it should desire, its power to revise the schedule of rates. A provision of this character will be found in nearly every legislative enactment throughout the country where provision is made for regulating and controlling public serving companies. Provisions requiring railways and other common carriers to make reports respecting sources of income and other matters the subject to regulation, are found in the Acts of Congress dealing with the regulations of Inter-State Commerce. Such provisions are also found in nearly every state enactment dealing with this important subject. When we have in mind the grant of power made by the Legislature of Iowa under Section 725, to regulate and control rates to be charged by public serving companies we are really driven to the conclusion that the purpose of the City of Chariton, as expressed throughout the ordinance in question, was to exercise this power. When we refer to Section 9 of this ordinance we find provision is made for an adequate service covering the entire city and that the service must be rendered during the day time and at night. In Section 8 we observe provisions regulating the conditions upon which it was deemed, by the city, extensions of service

would be proper. It could not be apprehended at the date of the passage of this ordinance the extent to which extended service might be found to be necessary to come within these conditions. It necessarily follows that it could not have been then apprehended by the city the amount of investment that would be ultimately required nor could it have been known the relation the income therefrom would have to the investment required. It is quite clear that this condition alone might produce changed situations calling for the exercise of the power of the city to change the compensation the company should receive. Viewing the ordinance in its entirety we believe there is a clear negativing of any purpose upon the part of the city to do more through the instrumentality of Section 3 of the ordinance than to regulate the rates to be charged as then appeared to be proper.

Where there is delegated to a city the power to make a binding contract for a rate to be charged consumers throughout the life of a franchise, the consumer becomes beneficially interested and the city could not raise such rate without the consumer's consent.

When the city exercises this power of government to fix rates, insofar as the same shall apply to private consumers, such act is for the benefit of the consumers and the company. When this power is once exercised, the consumer may exact service for the price fixed and the company may exact payment at the price so fixed. We must bear in mind in this connection that under the provisions of Section 720 of the Code above quoted, the

company has no option but to serve all consumers and this service must be given to all alike and upon identical terms. It seems then clear to me, that when this power is exercised and we concede that it is for the benefit of both the company and the consumer, that if we are to construe it as a contract, the consumer has a right to insist that the contract shall not be broken. Under such an interpretation the consumer may claim that a contract was made for him and the city has not the right to unmake such contract without his consent. Clearly, this is an abridgment of the power given by Section 725 of the Code and violates the prohibitions of this section. There are not many cases to be found where the question of the right of the consumer to maintain a contract fixing rates is involved. In the case of *Walton* v. *Proutt*, 174 S. W. 1152 (1153) we find the question involved. The court says:

> "We are of the opinion that appellant, as a citizen and user of water in the city, has a right to maintain an action to compel the water company to comply with its contract. There are authorities which clearly sustain that view, and we think they are correct. I Farnam on Waters, 160, B; *Pond* v. *New Rochelle Water Co.*, 183 N. Y. 330; *Robbins* v. *Bangor R. & Electric Co.*, 100 Me. 496. The New York Court of Appeals, in the case cited above, based its conclusion on the ground that the contract was made for the benefit of the citizens of the municipality, and that a citizen had a right to sue on the contract. The Maine court based its conclusion on the ground that mandamus was the proper remedy to compel the performance of the contract, and that an individual had the right to sue

to compel the performance of the public duty. Both of those decisions distinguish the question of the right of a citizen to sue for damages resulting from a breach of the contract."

The case of *Pond* v. *New Rochelle, supra,* is perhaps the most satisfactory case upon this subject. In that case, found in 76 N. E. 211 (213), the following appears:

"The general principle that, if one person contracts for the benefit of a third person, such third person may maintain an action on the agreement, has been applied since early in the seventeenth century in a large number of cases; the facts in each differing, to some extent. The leading case in England is *Dutton* v. *Pool*, 1 Vent. 318, 332, decided in the reign of Charles II. * * *

(214) The principle established by this case has been applied to contracts entered into by a father for the benefit of his daughter and by a husband for the benefit of his wife. As to the latter instance, see *Buchanan* v. *Tilden*, 158 N. Y. 109, 44 L. R. A. 170, 70 Am. St. Rep. 454, 52 N. E. 724. In the case before us we have a municipality entering into a contract for the benefit of its inhabitants, the object being to supply them with pure and wholesome water at reasonable rates. While there is not presented a domestic relation like that of father and child or husband and wife, yet it cannot be said that this contract was made for the benefit of a stranger. In the case before us the municipality sought to protect its inhabitants, who were at the time of the execution of the contract consumers of water, and those who might thereafter become so, from extortion by a corporation having granted to it a valuable franchise extending over a long period of time. We are of the opinion that the complaint states a good cause of action."

We contend from the foregoing that it clearly appears that at the time this ordinance was passed, the City of Chariton did not have the power to enter into a contract fixing maximum rates, but that it possessed the power to fix, establish and regulate rates. It is then our contention that the act of the city in adopting Section 3 of this particular ordinance was an exercise of this legislative power and cannot be construed as a contract.

II.

The United States Supreme Court will, in the construction of a state statute granting powers to a municipality, follow the interpretations given to such statutes by the highest court of the state.

The courts of the United States in all cases depending upon the meaning of the statutory enactments of states will adopt the construction which has been given by the highest courts of the particular state as to such statutes, unless the construction is in conflict with the constitution, laws or treaties of the United States. Under our dual system of government it must be conceded that the Federal Courts are vested with an independent jurisdiction to administer state laws and that this jurisdiction is co-ordinate with the jurisdiction of the courts of the several states and it is not at all subordinate to such jurisdiction. We find therefore that we have two co-ordinate jurisdictions administering the same law in the same territory and this endangers unseemly conflicts with possible resulting contrary conclusions respecting

identical facts covered by identical law. This situation has always required the exercise of the most perfect mutual respect by each jurisdiction towards the other. In a sense it is somewhat inconsistent to say that two entirely independent and co-ordinate jurisdictions are, in fact, co-ordinate respecting their powers of administration of the same law and that one must necessarily follow the other. Fortunately, however, our courts, both Federal and State, have succeeded in avoiding the unseemly conflicts that one might contemplate could possibly result from this dual system of court jurisdiction. In cases where contracts have been entered into between parties and rights have accrued to them or either of them under state statutes, the Federal Courts are not bound to follow the State Courts in cases where the particular contracts and rights thereunder were passed upon by the District Court of the United States at a time when there had been no construction of the statute given by the State Supreme Court, or when the question involved the impairment of an existing contract by reason of subsequent legislation. The Federal courts always should, and of course, will, in obedience to Section 10 of Article I of the Federal Constitution, protect the litigants from the impairment of obligations under contracts by the subsequent legislative enactment of any state. When this phase of the question, involving as it does a matter governed by the supreme law of the land, is not in the record of the case, the Federal Courts will lean towards the final adjudication of the state courts where the question might not be free from doubt, or will be bound to follow the adjudica-

tions of the state supreme court. In cases involving matters of purely local law, depending upon the construction of state statutes, delegating powers in local, political subdivisions of a state, the Federal Courts are bound to follow the interpretations and constructions placed thereon by the highest court of the particular state. To determine the exact rule that should be applied to a correct solution of our problem we must look to the record of our particular case.

The provisions of the Federal Constitution prohibiting state legislation impairing contracts, not involved.

That a grant of power made by ordinance of a municipality, upon the authority of the supreme legislature of a state, when duly accepted by the grantee will constitute a contract, is not disputed by any one. When this power is vested in a city to make the particular grant upon such conditions as it may see fit to impose, conditions always become a part of the contract and of course are binding upon all parties. This contract then cannot be interfered with, nor can the obligations of the parties under the same be impaired by any subsequent enactment of the supreme legislature or the municipality acting pursuant to and within its delegated power. In order, however, that there shall be such a contract there must have been, in the first instance, power vested in the legislative department of the municipality to make the contract. In the case at bar the City of Chariton had power under the provisions of Section 720 hereinbefore quoted, to grant authority now claimed by the

Southern Iowa Electric Company to use the streets for the transmission of electric current. It would grant this authority for a period not exceeding twenty-five years and the term expressed in such grant for any period of years less than this limitation upon power would constitute a contract. At the same time the city could not prescribe conditions making them a part of a binding contract, if such conditions involved the surrender of the exercise of a power of government vested in it, unless the authority so to surrender was clearly given by the supreme legislature. The authorities to which attention has been heretofore called clearly sustain these views. The City of Chariton claims, in the first count of its answer, that Section 3 of the ordinance in question constitutes a valid contract and that rights of the city became vested and that such rights would be now impaired if the court should hold that no contract existed. Section 725 of the Iowa Code vests in the municipality of Iowa, the power to regulate, control and fix rates and this is clearly the vesting of a governmental power. Unless this grant of power, authorized clearly and indisputably, the municipalities to bind themselves by irrevocable contracts there can be no contract made. The legislature of this state, however, saw fit to emphasize this well understood and clearly recognized principle of law, by coupling with the granting of power to the municipality, a prohibition that this power could not "be abridged by ordinance, resolution or contract." This supreme precaution arises undoubtedly because theretofore there existed authority to surrender this governmental power by contract.

The Federal courts are bound by the construction given by the Supreme Court of Iowa upon Section 725 of the Code respecting the power of cities to fix rates.

The question involved in this case and at the very foundation of its correct solution is whether or not the City of Chariton had power to make a binding contract respecting rates to be charged by this public serving company. It is simply a question of whether or not the State of Iowa, in the exercise of its sovereignty, saw fit to delegate a particular power to some political subdivision of the state. It cannot be doubted that the State of Iowa has a perfect right to say for itself what powers it will wish to give to municipalities. It would certainly result in the most unseemly and embarrassing situations if the state itself could not absolutely and finally determine just what powers it had given to municipalities, in absence of a well founded contention that there was a conflict with the contract clause of the Federal Constitution. This principle is announced in *Old Colony Trust Company* v. *Omaha*, 230 U. S. 100 (112). In the Old Colony case this court was called upon to determine the duration of a franchise grant and the solution of the question depended upon the construction of a statute of the State of Nebraska granting power to municipalities in that state. The portion of the opinion applicable to our question is as follows:

> "What was the life or duration of the privilege granted by the ordinance? Was it in perpetuity or for the corporate existence of the grantee? There is no claim, nor could there reasonably be, that it was during the pleasure of the city, or revo-

> cable at will. The Trust Company contends that it was a grant in perpetuity, and the city that it was for the corporate existence of the grantee. While the arguments have taken a wide range, it is of first importance to give attention to the statutes and decisions of Nebraska, because the city, being a creature of that state, derives its powers from the laws thereof and is necessarily within the influence of the decisions of the state's court of last resort."

This court then directs attention to the holdings of the State Courts of Nebraska upon the subject and proceeds:

> "To the state decisions here cited, counsel for the city interposes the objection that they are not well grounded, and that some of them go beyond what is expressed in the syllabus. We need not say more of the first branch of the objection than that, as the decision relates to matters of local law, namely, the construction of the state constitution and statutes and powers of local municipal corporations, they must be regarded by us as controlling, when their application involves no infraction of any right granted or secured by the Constitution of the United States. • • •
>
> In view of the facts in the present case, as before recited, these decisions of the Supreme Court of the state are conclusive upon the question of the right of the Trust Company to have the distribution of electric current for power and heat treated as included within the franchise contract of 1884 while it continues in force.

The facts in the case at bar do not warrant a contention that there is involved a condition running counter to any of the provisions of the federal constitution.

We have purely and simply a question of the extent of the power that was granted by the legislature to the City of Chariton. The opinion of this court in the case of *Claiborne County* v. *Brooks,* 111 U. S. 400 is directly in point upon this question:

> "It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal construction of the body politic of the state. But as all or nearly all of the states of the Union are sub-divided into political districts similar to those of the country from which our laws and institutions are in a great part derived, having the same general purposes and powers of local government and administration, we feel authorized, in the absence of local state statutes or decisions to the contrary, to interpret their general powers, in accordance with the analogy furnished by their common prototypes, varied and modified, of course, by the changed conditions and circumstances which arise from our peculiar form of government, our social state and physical surroundings."

This court has always been careful in dealing with this delicate question and in nearly every case directs attention to the fact that the powers of the Federal Court are co-ordinate with and not subservient to the powers of state courts, yet has always announced a determination to follow the state law and the constructions thereon, given by the Supreme Court of the state when not

in violation of the federal constitution, laws and treaties. This question has been before the court in numerous rate cases. In the case of *Milwaukee Electric R. & L. Co.* v. *Rd. Co.,* 238 U. S. 174 the following quotation will be found pertinent to this question:

> "It is true that this court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no state shall pass any law impairing the obligation of a contract requires this court to determine for itself whether there is a contract, and the extent of its binding obligation; and parties are not concluded in these respects by the determination and decisions of the courts of the states. While this is so, it has been frequently held that where a statute of a state is alleged to create or authorize a contract inviolable by subsequent legislation of the state, in determining its meaning much consideration is given to the decisions of the highest court of the state."

In the case of *Freeport Water Company* v. *Freeport,* 180 U. S. 587, the statute involved was not altogether clear as to whether or not the power to make a contract respecting rates was given to the city. This court, however, followed the construction of the state courts of Illinois.

In the case of *Richmond* v. *Smith,* 82 U. S. 429, we find the following announcement:

> "Suppose, however, the exceptions to the judgment are sufficient to raise the questions which the defendants desire to present for decision, still the court would feel constrained to affirm the judgment upon the ground that the Supreme Court of

the state have decided in an analogous case that the corporate authorities of the city had authority under the charter of the city to make the order for the destruction of the liquors and to give the pledge for payment, and that the defendants are responsible for the value of the liquors destroyed under that order. State courts certainly have a right to expound the statutes of the state, and having done so, those statutes, with the interpretation given to them by the highest court of the state, become the rules of decision in the federal courts."

In the case of *Burgess* v. *Seligman*, 107 U. S. 20 the question under examination received a clear analysis and exposition:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State

Constitutions and Statutes. Such established rules are always regarded by the Federal courts, no less than by the State Courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrine of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid and in most cases do avoid any unseemly conflict with the well considered decisions of the State Courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and ex-

> pressions used in previous decisions. The principal cases bearing upon the subject are referred to in the margin, but it is not deemed necessary to discuss them in detail."

In the Seligman case attention is directed to the fact that the question of construction was open. In the case at bar the statute involved in the controversy, received construction from the highest court of the state. In the different cases coming before the Supreme Court of Iowa wherein this question was involved, the conclusions of the court have been uniformly in accord with the contentions we are making. The Supreme Court of Iowa in several cases commencing at a time prior to the happening of any of the events involved in this controversy, held that under section 725 of the code, cities had the power to regulate and control rates and that under section 473 of the Code of 1873 the cities had the power to agree by contract as to rates and that since the adoption of section 725 of the Code that the right to agree by contract did not exist. It is clear, from the history of the legislation of this state, from the wording of the statute itself and from the construction given by our State Supreme Court that the power of contract did not exist. The language of the statute in force at the time of the adoption of the ordinance in question, as the same was construed and interpreted by the Supreme Court, in a sense became a part of the instrument and in so far as it may be construed to be a contract became a part of the contract. This observation clearly brings us within the rule in the Seligman case:

> "Since the ordinary administration of law is carried on by State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state and have all the effect of law, and which it would be wrong to disturb."

It would be a serious interference with the ordinary adminstration of law in this state, and result in producing an extremely chaotic condition, if the charters of a large portion of the public serving companies of the state should receive a final adjudication in the Supreme Court in accordance with the rules it has declared and then in a few instances a contrary rule should be established by the Federal Courts. In the Seligman case, *supra*, reference is made to the condition, that where controversies or transactions occur and are involved in a case in the District Court of the United States and up to the time the Federal Court construes the question, there has been no adjudication in the state courts. The Supreme Court will then claim the right to itself, to disregard the rulings of the State Court. The situation in this state, however, will not permit the application of this rule. The Supreme Court of Iowa had declared long before the adoption of the ordinance in question in the case of *Cedar Rapids* v. *Cedar Rapids*, 144 Iowa 426, that the power to make a binding contract with respect to rates must be clearly given by the statute. This same holding was announced by the Iowa Supreme Court in a construction upon section 473 of the Code of 1873 in the case of *Independent District* v. *Le Mars Light & Water*

Company, supra. The opinion of the Supreme Court in the case of *Tipton* v. *Tipton Light & Heating Company, supra,* was filed on May 10, 1916. The opinion in the case of *Iowa Railway & Light Company* v. *Jones Auto Company, supra,* was filed by the Supreme Court of Iowa on October 25, 1917. The opinion in the case of *Town of Williams against Iowa Falls Electric Company, supra,* was filed on February 17, 1919. All of these cases involved specifically the question presented in the case and all of the opinions were filed before decree was entered by the District Court of the United States in this case. It appears from the record of this case (p. 45 Rec.) that the memorandum opinion of the learned judge of the District Court who tried this case was filed on March 24, 1919 (256 Fed. p. 929). The decree in this case was filed on the 3rd day of July, 1919, (p. 69 Rec.). We have therefore a clear pronouncement in the statutory law of Iowa, containing a specific prohibition against the making of contract respecting rates and a uniform line of construction by the highest court of the state in exact accord with the contentions we are making. Surely this situation requires that the Supreme Court shall lean to the construction given by the Supreme Court of Iowa.

III.

The court should not have ordered a submission of the case under Equity Rule 29, upon the issue made by plaintiff's petition and amendments and the first count of defendant's answer.

This cause was set down for hearing on order of court upon the first count of defendant's answer, admitting the allegations of plaintiff's petition and amendments respecting the business of the plaintiff and the passage of the ordinance. There is one paragraph in the answer of defendants similar to the language of demurrer, alleging that the petition and amendments do not entitle the plaintiffs to the relief demanded. This order should not have been entered by the court in the absence of a specific allegation in the first count of the answer, that the allegations in the petition and amendments, at least material to the main question of the case, were true. It is a fact, however, that the first count of the answer does not deny the allegations of the petition and amendments, that the income under the rates prescribed by Section 3 of the ordinance were insufficient to meet the operating expense. The rules of practice for the courts of equity of the United States are designed to simplify the practice in courts of equity of the United States and certainly have had that result. It may be doubtful in this case whether under the allegations of the petition the defense set forth in count one of the answer could have been made by demurrer or plea under the old practice. If it should be contended in this case that the issue determined by the court could not, in fact, have been determined by demurrer or plea under the old practice, then clearly the court erred in disregarding the request of plaintiff for the trial of all the issues of fact.

IV.

The enforcement of Section 3 of the Ordinance would violate provisions of the Federal Constitution.

Under the allegations of plaintiff's petition, it clearly appears that the income derived from the rates prescribed by section three of the ordinance are insufficient to meet the operating expense. If the Southern Iowa Electric Company is compelled to continue rendering service to the inhabitants of Chariton upon the rates prescribed in such section of the ordinance, it will be required to pay for the privilege of delivering current to consumers. The delivery of electric current to consumers is the delivery of property. The requirement, that a public serving company shall furnish electric current for less than cost, when so required pursuant to a legislative enactment, amounts to the taking of property of the company without compensation. As we have seen, the adoption of section 3, was the exercise of the legislative power of the City of Chariton and by its terms the city exacts the performance of service for less than the cost thereof. The right of the plaintiff to pursue the remedy sought for in this case is sustained by the announcement in Home Telephone case and other cases hereinbefore cited.

We submit therefore, that the decree of the District Court of the United States, for the Southern District of Iowa, should be reversed and that such decree be ordered by this court as will preserve to the appellant all of its rights at law and in equity; that the cause should be remanded to the lower court with directions to set aside

the decree from which this appeal was taken and afford appellant an opportunity to have the procedure to which it may be entitled under the allegations of its petition.

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W. E. MITCHELL,
J. C. PRYOR, JR.,
D. L. ROSS,
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Counsel for Southern Iowa Electric Company, Appellant.

Emmet Tinley
of Counsel.

FILED
JAN 11 1908
JAMES H. BAKER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 186.

SOUTHERN IOWA ELECTRIC COMPANY, *Appellant*,

vs.

THE CITY OF CHARITON, ET AL., *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF AND ARGUMENT OF APPELLEE.

H. W. Byers,
J. W. [illegible],
Attorneys for Appellee.

SUBJECT INDEX.

Page

Statement of Case 1
Proposal as made to City 2
Acceptance of Proposal 3

I.

The Submitting the Proposition with the Ordinance Containing the Maximum Rate Clause Attached, and the Accepting of That Proposition and Enactment of the Ordinance on the Part of the City and Acceptance Thereof on the Part of the Company, Constituted a Contract, Which the City was Authorized to Make 4
Section 720 Iowa Code 1913 5
Section 725 Iowa Code 1913 5
It was Clearly the Intention of the Iowa Legislature to Grant the Right to Contract 6
Act of April 10th, 1888 7
City can both Regulate and Contract for Maximum Rate Under the Iowa Statutes 8
Opinion of Trial Court in Part 9
Knoxville Gas Company vs. City of Knoxville, 253 Fre. Rep. 220 10
City of Noblesville vs. Gas Co., 60 N. W. 1032 12
Traverse City vs. Mich. R. Com. P. U. R. 1918 F. page 752 .. 12
Traverse City vs. Citizen's Tel. Co., 161 N. W. 986 12
Omaha Water Co. vs. City of Omaha, 147 Fed. 1, Annoted Cases, Vol. 8, page 614 12
Woodburn vs. Public Ser. Com., 82 Ore. 114, P. U. R. 1917 B, page 967 13
State ex rel., Tacoma R. & P. Co. vs. Public Com. 172 Pac. 290 14
Webster vs. Superior Court, 192, R. A. 1915 C., Page 291 .. 14
Dawson vs. Dawson Tel. Co., 137 Ga. 62; 72 S. E. 508 14
Cedar Rapids Gas Light Co. vs. Cedar Rapids, 225 U. S. 655 15
Cities can be Delegated both the Right to Regulate and Contract 18
State ex rel. Indianapolis Traction Co. vs. Lewis, P. U. R. 1918 F., Page 113 18
Re Muncie Electric Light Co., P. U. R. 1918 B, Page 200 ... 19
Re Gary & Interurban Ry. Co., et al., 1918 A., Page 95 19
City of Manitowoc vs. Manitowoc and N. Traction Co., 129 N. W. 925 19
Salt Lake City vs. Utah Light & Traction Co., 173 Pac. 558; P. U. R. 1918 F., Page 337 19
Quinby vs. Public Service Commission, 223 N. Y. 244; 119 N. E. 433 19

Knoxville Gas Co. vs. Knoxville, 253 Fed. 223 20
Los Angeles vs. Los Angeles Water Co., 177 U. S. 558 20
Knoxville Water Co. vs. Knoxville, 189 U. S. 436 20

II.

The Utilities are Estopped from Claiming there is no Contract 21
Beach & Wild vs. Wakefield, 107 Iowa 591 22
Fidelity Ins. Co. vs. German Savings Bank, 127 Iowa 591...22
Muncie Natural Gas Co. vs. Muncie, 60 L. R. A., Page 822...22
State Bd. of Agri. vs. Citizens Street R. Co., 47 Ind. 407; 17 Am. Rep. 702 23
Belfast vs. Belfast Water Co., 98 Atl. 738 P. U. R. 1917 A, Page 317 24
The Court is not Bound to Follow the Construction Placed on the Statute by the Iowa Court 26
Iowa Ry. & Light Co. vs. Jones Auto Co., 164 N. W. 780 (Iowa) 26
Des Moines B. G. St. Ry. Co., 73 Iowa 513 27
Burges vs. Seligman, 107 U. S. 20 27

TABLE OF CASES CITED.

I.

Page
Act of April 10th, 1888 7
Section 720 and 725 Iowa Code 1913 5
Beach & Wild vs. Wakefield, 107 Iowa 591.....22
Belfast vs. Belfast Water Co., 98 Atl. 738 P. U. R. 1917 A page 317 24
Burges vs. Seligman, 107 U. S. 20 27
City of Noblesville vs. Gas Co., 60 N. W. 1032.....12
Cedar Rapids Gas Light Co. vs. Cedar Rapids, 225 U. S. 655 15
City of Manitowoc vs. Manitowoc and N. Traction Co., 129 N. W. 925 19
Des Moines B. G. St. Ry. Co., 73 Iowa 513 27
Fidelity Ins. Co. vs. German Savings Bank, 127 Iowa 591...22
Iowa Ry. & Light Co. vs. Jones Auto Co., 164 N. W. 780 (Iowa) 26
Knoxville Gas Company vs. City of Knoxville, 253 Fed. Rep. 220 10
Los Angeles vs. Los Angeles Water Co., 177 U. S. 558.....20
Muncie Natural Gas Co. vs. Muncie, 60 L. R. A. page 822....22
Omaha Water Co. vs. City of Omaha, 147 Fed. 1, Annotated Cases, Vol. 8 page 614.....12
Quinby vs. Public Service Commission, 223 N. Y. 244; 119 N. E. 433 19

Re Muncie Electric Light Co., P. U. R. 1918 b, page 200....19
Re Gary & Interurban Ry. Co., et al., 1918 A. page 95.....19
State ex rel Indianapolis Traction Co. vs. Lewis, P. U. R. 1918 F. page 113 18
Salt Lake City vs. Utah Light & Traction Co., 173 Pac. 558; P. U. R. 1918 F. page 337.....19
State Bd. of Agr. v. Citizens Street R. Co., 47 Ind. 407; 17 Am. Rep. 702 23
State ex rel, Tacoma R. & P. Co. vs. Public Com., 172 Pac. 290 14
Traverse City vs. Citizen's Tel. Co., 161 N. W. 986.....12
Webster vs. Superior Court, 19 L. R. A. 1915 C page 291....14
Woodburn vs. Public Ser. Com., 82 Ore. 114, P. U. R. 1917 B page 967 13
Opinion of Trial Court in Part 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 180.

SOUTHERN IOWA ELECTRIC COMPANY, *Appellant,*
vs.
THE CITY OF CHARITON, ET AL., *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF AND ARGUMENT OF APPELLEE.

STATEMENT OF THE FACTS.

In addition to the statement of facts as made in Appellant's Brief the Court's attention is directed to the following:

This action was heard on the issue raised by Count I of the Amended and Substituted Answer and said count does not admit that the rate as fixed by the franchise ordinance is non-compensatory.

Count II denies that the franchise rates are non-compensatory.

Count I alleges that the franchise ordinance is a binding contract on the appellant company and the case was determined solely on that issue.

Counsel for Appellee believes it very material that the court's attention should also be particularly directed to the fact that the city of Chariton had owned and operated its own electric light plant for a great number of years prior to August, 1914, at which time one Edwin P. Perrigo sub-

mitted to the city counsel the proposition to purchase the same, set out as follows:

"Gentlemen:

Having been advised that the city of Chariton desires to sell its electric light plant and is willing to grant to the purchaser a franchise for the conducting during a term of years of an electric lighting, heating and power business I hereby make and submit the following proposals:

Appended hereto, and constituting a part of, is a form of an ordinance which, when passed and approved and ratified by the mayor and city council and electors of the city of Chariton, I will accept; and upon the passage, approval, ratification, and acceptance thereof I will pay in cash to the city of Chariton the sum of sixty-five thousand dollars for all the rights, privileges and benefits granted to me or to my assigns, in, by and under said ordinance, and for all the property now constituting the electric lighting, heating and power plant of the city of Chariton, and consisting of boilers and piping, engines, generators, exciters, switch boards and all other power house equipment and supplies, and also all poles, wires, cross arms, braces, transformers, conductors, conduits, meters, or other property and supplies belonging to the transmission system of said city, and also all other property of whatsoever description, including all records and contracts, excepting the real estate pertaining to said electric plant, the electrolier posts and office furniture. The city of Chariton to grant to me or assigns free from rent or cost the possession and use of the real estate and buildings now used by it in the production of electric lights, heat and power for a period of eighteen months after I or assigns become possessed of the property hereinabove described. It is understood that all property hereinabove mentioned pertaining to said electric light plant, excepting real property, electrolier posts and office furniture which may be now owned or acquired up to the time I come into possession of the plant, shall pass to me and also all records and contracts, and that I shall become possessed of all the property free from all claims or incumbrances.

I further agree to purchase meters now owned by customers of about 220 in number at a fair cash value.

I will enter into the street lighting and pumping contract hereto appended.

The expense of a special election called for the purpose of submitting the franchise ordinance to the voters will be paid by me.

I herewith enclose and deposit a certified check in the sum of five thousand ($5000.00) dollars as an evidence of my good faith, which, when this proposition is accepted, may be retained and shall apply upon the purchase price but which shall be immediately returned to me in the event this proposition is rejected.

This proposition in order to bind me shall be accepted by the mayor and city council of said city and the street lighting and pumping contract hereto appended entered into within ten days from the date hereof, and the ordinance hereto appended shall be duly passed, approved and ratified, all as provided by law, within sixty days from the date hereof.

Respectfully submitted,

EDWIN P. PERRIGO."

This proposition was accepted by the council by the following resolution:

"Be it resolved, by the city council of the city of Chariton, Iowa, that the proposal submitted by Edwin Perrigo to purchase the electric light plant of the said city of Chariton, Iowa, for the consideration of sixty-five thousand dollars ($65,000.00) and signed by Edwin B. Perrigo, and accepted and signed by the committee composed of W. A. Eikenberry, A. B. Gookin, E. A. Anderson, G. W. Ensley, O. J. Israel, and H. B. Blanchard, citizens, and J. M. Kneeland, F B. Curtis and E. F. Gasser, members of the electric light committee of the city council of the said city of Chariton, Iowa, be and the same is hereby accepted and approved with the terms and conditions therein contained, and further that this council approves the franchise, ordinance agreed upon by said Edwin B. Perrigo and the members of said committee.

J. C. SEWARD,

Mayor."

After this action was had the council adopted the franchise ordinance and the ordinance and proposition of purchase were submitted to the electors of the city to be voted upon as by law provided. The electors voted favorably and the ordinance was finally adopted by the council and accepted by said Perrigo who, almost immediately, assigned his interest to the Appellant Company.

I.

SUBMITTING THE PROPOSITION WITH THE ORDINANCE CONTAINING THE MAXIMUM RATE CLAUSE ATTACHED, AND THE ACCEPTING OF THAT PROPOSITION AND ENACTMENT OF THE ORDINANCE ON THE PART OF THE CITY AND ACCEPTANCE THEREOF ON THE PART OF THE COMPANY, CONSTITUTED A CONTRACT, WHICH THE CITY WAS AUTHORIZED TO MAKE.

Replying to that part of division one of the Appellant's Brief, reading:

> "The City of Chariton, in adopting the ordinance granting the franchise in question, including therein a section prescribing the maximum rates to be charged for current furnished to consumers, exercised its legislative power to regulate, control and fix rates under the provisions of Section 725 of the 1913 Supplement to the Code of Iowa, expressed the will of the city under the conditions then existing."

It is Appellee's position that the city did not exercise its "legislative power to regulate" at the time of adopting the ordinance but merely transacted a business proposition whereby it entered into a contract with Perrigo fixing a maximum rate.

Perrigo presented to the city his proposition which, boiled down, was; I am informed that you desire to sell your plant, "appended hereto, and constituting a part hereof, is a form of an ordinance which," if you will give me together with your electric light plant, "its boilers, piping, engines, generators, exciters, switch boards, * * * poles, wires, cross-arms, braces, transformers, conduits * * *", I will pay you $65,000.00 and will accept said ordinance. Section 3 of the "appended" ordinance provides,

> "The grantee shall sell current at rates not to exceed for monthly consumption those named in the following schedules:"

The acceptance on the part of the city of this proposal, the granting of the franchise and the acceptance of it, the parting with its plant, poles, wires, and the paying and accepting of the $65,000.00, would under most circumstances be construed to constitute a contract. And it is my contention that, under the laws of Iowa and the decisions of the court now addressed, it was a contract; that it was not a regulation of rates but was for every purpose a mutual agreement between

Perrigo and the city whereby a maximum rate was fixed for the entire life of the contract.

The statutes of Iowa give this city the right to contract,

"Sec. 720. Heating Plants—water or gas works—electric plants—purchase and sale of heat, gas, water and electric current. They shall have power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town, heating plants, waterworks, gas works or electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants, and lease or sell the same. They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew, amend or extend the terms of such grant; but no exclusive franchise shall be thus granted, amended, extended or renewed. *And they shall have power to enter into contracts with persons, corporations or municipalities for the purchase of heat,* gas, water, and electric current for either lights or power purposes, and shall have power to sell the same either to residents of such municipality, or to others, including corporations, and to erect and maintain the necessary transmission lines therefor either within or without the corporate limits, to the same extent, in the same manner, and under the same regulations, with the same power to establish rates and collect rents as is or hereafter may be provided by law for cities having municipally owned plants. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed or amended, or contract of purchase entered into, unless a majority of the legal electors voting thereon vote in favor of the same at a general, city or special election.

Sec. 725. Regulation of rates and service. They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, heat, water, light or power for other necessary purposes, and to regulate and fix the rent or rate for water, gas, heat, light, or power; to regulate and fix the rents or rates of water, gas, heat and electric light or power; to regulate and fix charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution or contract."

IT WAS CLEARLY THE INTENTION OF THE IOWA LEGISLATURE TO GRANT THE RIGHT TO CONTRACT.

Appellant's Brief properly sets forth the history of the legislative enactments of the State of Iowa pertaining to this issue but the conclusions reached are most unreasonable.

It will be noticed that the first legislation had on the subject gave to all cities the right to contract for rates. This law stood unchanged until the 22nd General Assembly, at which time cities of over seven thousand were given additional power to regulate. By this time the Legislators had learned that it was not good policy to permit the larger cities to enter into contracts binding the inhabitants and the future administrations to a certain rate and the manner in which the governments of the larger cities were being corrupted at that time is too well known to necessitate a review in order to justify the action of the legislature. Those legislators saw that cities must have the additional power to regulate in order that it might be possible to secure protection to the inhabitants and they knew that it would not do to let that power to regulate be abridged in any manner whatsoever.

In this connection it must be remembered that the original sections 421, 423, 425 applied to water works only. On the 9th day of April, 1888, the 22nd Gen. Ass. amended the sections so that they applied to electric light plants, and gas works, and on the very next day, April 10th, 1888, this same legislature gave to cities of over Seven Thousand additional power among which was: "to regulate the price of gas, electric light, and water rates, and to regulate and fix the charges for water meters, electric light meters, or any other device or means necessary for determining the consumption of gas, water, or electric light.

This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract, whereby the above powers are abridged."

Is construction of Appellant's council that on the 9th of April the legislators enlarged the power of the city by granting powers over other utilities and on the next day it repealed that part of the section which gave the right to contract to cities of over seven thousand reasonable? Repeals by implication are not only not favored in law but they are seldom made in fact.

Section 473 as it originally stood authorized Iowa cities to enter into contracts which the city could not break and the legislators, by Act of April 10th, 1888, simply gave the additional power to regulate and saw to it that that power could not be bartered away.

On July 4th, 1888, when Chapter 16 of the 22nd General Assembly became effective Iowa cities had the right to contract and there was no law saying that they could not con-

tract. The original statute was in full force. The Act of April 10th gave the additional power to cities over seven thousand to regulate and expressly recognized the right of those cities to contract, first for the reason that it did not repeal the original act which had been amended the day before, and, second, because it expressly provided that the contract which might be made under the original act could not take away the right to regulate. It did not say there should be no contract but merely that there should be no contract of a certain kind.

Note the language used in Section 1 of the act of April 10th, 1888. "That all cities of the first class and cities of the second class, having over 7000 inhabitants, and cities organized under special charters in this state in *addition* to the power now granted, shall have the further and *additional* power conferred by this Act, as follows, to wit: to regulate * * * and to regulate the price of gas, electric light * * *." It must be admitted that this act of April 10th did not repeal Sec. 473 which had been amended on the day before and that it granted the *additional* and *further* power just as it said it did. No reasonable being can reach any other conclusion. The intention is plain and the language and circumstances do not admit of any other possible construction. The Act itself is entitled "An Act Granting Additional Power to Certain Cities."

Counsel for Appellant says on page 43 of this Brief,

> "The foregoing outline presents the state of the legislation in Iowa upon this subject until the adoption of the Code of 1897. With the adoption of the Code of 1897, Sections 471, 473 and 475, as they appeared in the Code of 1873, together with the subsequent amendments thereof, were dropped from the Code and in consequence were repealed."

In this we differ:

The declared reason for Appellant's Counsel reviewing the legislative enactments is to aid the court in arriving at the intention of the legislators and it must be admitted that that intention must prevail in the construing of the statutes. This being the case the intention of the legislators must be determined to be as found in the old statutes, for no new statutes have ever been enacted upon the subject in such a manner as will enable the court to get the legislators' intent.

Section 725 is not a direct, distinct and separate legislative enactment. Sections 471 and 473 stood as the law from 1888 until 1897 when certain men were appointed by the legislature as compilers and commissioners and they codified Sections 471 and 473 and the Code of 1897 was adopted containing Section 725.

I do not contend that Section 725 is not the law. I simply say that the compilers sought to express the law in better form and combine the two old sections and that the law was not changed. Those men then took the law as it was and left it as it was and we must look to the two old statutes to gather the legislative intent.

The old statute uses the word "contract", the amendment of 1888 uses the word "regulate". The codifiers used the words "regulate and fix" and intended to and did mean exactly as did the legislators in enacting the old statutes. The legislators in the old statute used the language,

> "This shall not be construed to authorize the passage of an ordinance or resolution or the making of any contracts, whereby the above powers are abridged."

The codifiers used the language,

> "and these powers shall not be abridged by ordinance, resolution or otherwise".

And who can maintain in reason, that, while there is great difference in the wording, there is any difference in the meaning or intention? And who can maintain in reason, that both the legislators in the old statute anl the compilers in the revision did not mean exactly the same thing and that the language in both cases did not apply to the identical *"additional"* and *"further"* powers as granted by the Act of April 10th, 1888.

Appellant's contention is that the language "shall not be abridged by ordinance, resolution or contract" as found in Section 725 is an "absolute prohibition" against the right to contract, and even go so far as to take the position that the similar language used in the Act of April 10th, 1888, has a like effect. Just how they justify such a position in face of the fact that the Act clearly stated to be a grant of "additional and further powers" is not shown, but it is well established in law that the state, or the municipality under proper grant, has the right to contract that rates shall not be greater than a certain amount and has also the right to regulate those rates lower than that amount.

CITY CAN BOTH REGULATE AND CONTRACT FOR A MAXIMUM RATE UNDER THE IOWA STATUTES.

It is the Appellee's position that there is nothing either illegal or inconsistent in the legislatures providing that the city may contract for a maximum rate and may regulate it lower. Such a contract is binding on the utilities to not charge a higher rate. In the instant case the Appellant Com-

pany bound itself not to charge more than the rate as fixed in its proposal and the affixed franchise which it submitted to the council and did so with the condition that the city could regulate. The language is not a "prohibition" against contracting. It is a saving clause limiting the city and protecting it from contracts which would be ruinous to its inhabitants. And the reason for its use was because of the fact that the reports are full of cases where the city has granted a franchise agreeing to a certain rate, often for a period of 50 years, and the utilities companies have at all times in the past sought for and obtained the aid of all the courts of this land in upholding those franchises as being binding contracts, and this regardless of how great the hardship might be, on the city.

These cases are so numerous their citation is unnecessary and it is certainly a new and startling position for a utilities company to claim that it can make its own proposition, take a light plant over completely and not be bound by the rate agreement.

Since courts began writing opinions it has been the law of this land that authority given to a city to grant the right to the use of its streets does not merely give the city the right to say, yes or no, but carries with it the right to impose conditions. The court in rendering the opinion in this case correctly states the law as follows:

> "It is a general rule with relation to the exercise of the power by a city that "if the mode of exercise is not prescribed in the act or charter conferring the power, or in some other statute, the corporation may exercise the power in any usual and appropriate manner, according to its own discretion. 28 Cyc. 275, and authorities cited.
>
> "This statute expressly confers on cities and towns, the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised is left to the discretion of the corporation, subject, however, to the general rule, that the ordinance must be reasonable. The power given in substance is to regulate, and this implies that the corporation is empowered to do all things essential to the proper exercise of the power expressly conferred." *Davis vs. Town of Anita*, 73 Iowa, 325.

In the State of Iowa, a city is given the power to grant franchises without any limitation, except that such franchise shall not extend more than twenty-five years and that no exclusive franchise shall be granted. When this law was passed, it was, and still is, the well settled rule, that "when a municipal corporation has the power to grant or refuse, in its discretion, permission to a public service company, to occupy the streets with its structures,

whether such permission be called a franchise, a license, a permit, or a mere designation of the streets to be occupied, it may grant such permission, subject to such conditions as it sees fit to impose." 19 R. C. L., page 1153, Par. 427. Of course, such conditions must not be against law or public policy.

The city having the power to grant a franchise, the right to impose conditions, is limited only by the terms of the grant of the power. Therefore it is self-evident that unless other legislation, and especially Section 725 of the Code of Iowa, limits the power with reference to conditions to be imposed in granting franchise, a provision as to maximum rates will be binding.

Sec. 725 confers the power to "regulate and fix," but it does not specify how such power shall be exercised; and under the rule above stated, it has the power to use its own discretion as to how such power shall be exercised.

In *Miller vs. City of Webster City, Iowa*, 62 N. W. 648, Judge Deemer says,

"As the statute expressly confers upon the city the authority to establish markets and to provide for the weighing of commodities and contains no limitations upon the power granted, the time, manner and expediency of its exercise are left to the discretion of the corporation; and the judgment of its officers upon such matters cannot be controlled by the Courts, so long as they act within the scope of their authority, the discretion of a municipal corporation within the sphere of its powers, is as wide as that possessed by the Government of the state, subject however, to the general rule that the ordinances must be reasonable. The actions of the city Council in the exercise of expressly delegated powers cannot be questioned upon the ground that it is in conflict with public interests."

The law of Tennesseee did not specifically delegate any power to the city to fix rates, while the Iowa law does specifically say the city can do so and we find this language in the cause of *Knoxville Gas Company vs. City Knoxville*, 253 Fed. Rep. 220.

"The City Ordinance said to the company.

"You may occupy my streets and alley for 50 years with your pipes, conduits and other things necessary to the manufacture and distribution of gas, upon condition that you will never charge more than $1.10 per thousand cubic feet therefor.

The company replied in writing that it accepted the franchise with that condition. I think that constitutes a contract between the city and gas company."

"In McQuillin, Municipal Corporations, Sec. 1644, it is said, if the consent of the municipality is necessary to the use of streets by a public service company, the municipality, upon granting the right to use the streets, may impose conditions on the company which would be binding on the company if it accepts the right to use the streets. In *Boerth vs. Detroit City Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197, the court said:

"Where a gas company is given the right to occupy city streets only with the consent of the municipality, the city is under no compulsion to grant such right, and as to the price thereof may impose such restrictions as to rates as it sees fit."

"The ordinance under consideration having been duly enacted under statutory authority, and the terms and conditions thereof having been voluntarily and understandingly accepted by the Gas Company in writing, constitutes a contract from which the plaintiff cannot be relieved without the consent of the city. *Cleveland vs. City Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; *Cleveland vs. Cleveland Elec. Ry. Co.*, 194 U. S. 538, 24 Sup. Ct. 764, 48 L. Ed. 1109; *Detroit vs. Detroit Citizens' Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410 46 L. Ed. 592.

"Per contra, *Home Telephone Co. vs. Los Angeles*, 211 U. S. 270, 29 Sup. Ct. 53 L. Ed. 176, is cited and relied on by the plaintiff. I think that case is clearly distinguished from the instant case. There it is held that a municipality may not enter into a contract fixing unalterably during the term of franchise the charges for telephone service, and thus disable itself from exercising the power of regulation, under a charter authority to regulate telephone services, and to fix and determine the charges therefor, in the absence of clear and affirmative legislative expression granting such power, or from which such power may be necessarily implied. That is not the question before the court. The clause of the contract under consideration undertakes to bind the Gas Company to only one thing, to wit: that the Gas Company during the life of the franchise will never charge for gas more than the rate named. The city has not undertaken to nor has it contracted away its charter right of "prescribing the terms" on which the Gas Company may occupy its streets. It may yet permit the Gas Company to increase or under proper showing require it to decrease charges for its service. In the *Telephone Case, supra*, Mr. Justice Moody said:

"It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves may through their

relation with other facts turn the balance one way or the other."

I believe that I am perfectly safe in making the statement that no case in any jurisdiction of the United States can be found where cities have been given the power to "regulate" rates in a franchise which holds that such franchise rates were not binding on the grantee. There are cases which hold that the act of the state in enacting a commission with power to regulate withdraws the power of the city and that the action of the commission is not an impairment of a contract but these cases do not decide that there was no contract, they simply hold that so far as the city is concerned the state can withdraw the power. Some of these cases are cited in Appellant's Brief and have no application here.

On the question of the distinction between power to regulate and power to contract, and showing that one is a governmental power and the other a contractual one, that one requires action by the government and the other an agreement of both parties, and the city can do both see, *City of Noblesville, vs. Gas Co.*, 60 N. W. 1032.

So, in this case the right to contract was again based on the right to refuse the use of its streets, or to impose any condition it saw fit in granting such use. See also to the same effect, *Traverse City vs. Michigan R. Commission, P. U. R.*, 1918 F, page 752. See also *Traverse City vs. Citizens' Telephone Company*, 161 N. W. 986, where the court says:

> "While plaintiff was not given by its charter express power to regulate rates, it had, under its charter, implied administrative authority to make permissive contracts as to them."

But even if such were not the case, the Iowa Statute expressly grants the power to contract by the language "to regulate and fix". It is a familiar rule of construction that all parts of the statute shall begiven effect whenever possible and if the word "fix" means the same as "regulate" why was it added? But "fix" has been construed by the courts of other states to have two distinct meanings when used in connection with public utility rates.

See *Omaha Water Co. vs. City of Omaha*, 147 Fed. 1, Annotated Cases, Vol. 8, page 614, which aptly illustrates the different uses of this word fix by this quotation:

> "The power to *fix* and to *regulate* the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation, and other public utilities partakes of the nature of a governmental (6) power and

also of that of a business power. Are the inhabitants of a city paying rates not *fixed* by contract to quasi-public corporations for public utilities? The power to so regulate these rates that they shall not be unreasonable is a legislative, a governmental power, which the state or city may exercise, but may not renounce. Is a city without water works and hence without rates at which any one will furnish water therefrom to the municipality or its inhabitants? The making of a contract for the construction and operation of waterworks wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years, is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate. It is to procure water and get rates for the city and for its inhabitants."

See also *Woodburn vs. Public Service Commission*, 82 Or. 114, P. U. R. 1917 B, page 967, where the court distinguishes between the fixing of rates by compulsion, and the fixing by agreement:

"The right of the state to regulate rates by compulsion is a police power, and must not be confused with the right of a city to exercise its contractual power to agree with a public service company upon the terms of a franchis. The exercise of a power to *fix rates by agreement* does not include or embrace any portion of the power to *fix rates by compulsion.* When Woodburn granted the franchise to the telephone company the city exercises its municipal right to contract, and it may be assumed that the franchise was valid and binding upon both parties until such time as the state chose to speak; but the city entered into the contract subject to the reserved right of the state to employ its police power and compel a change of rates, and when the state did speak, the municipal power gave way to the sovereign power of the state (citing cases). The power to *fix rates by compulsion* as distinguished from the power to *fix rates by agreement* is not granted to cities or towns nor is the right of the legislative assembly to legislate upon that subject curbed, by Article 11, Sec. 2, of the state Constitution, because in its essence it is neither a municipal power nor an incident to a pure municipal power, and therefore * * * the legislative assembly was not prohibited from making the Public Utility Act applicable to urban as well as extraurban territory."

See also *State ex rel., Tacoma R. & P. Co. vs. Public Service Commission*, 172 Pac. 290, P. U. R. 1918 E, page 277, at page 281, where the following comment on the Cleveland City R. Co. case, occurs:

> "In *Cleveland vs. Cleveland City R. Co.*, 194 U. S. 517, 48 L. Ed. 1102, 24 Sup. Ct. Rep. 756, the court had occasion to construe a section of the Revised Statutes of the state of Ohio which authorized cities "to *fix* the terms and conditions upon which such * * * railways may be constructed, operated, extended, and consolidated;" and it was there held that this statute was an express authorization to the city to impose conditions when granting a franchise."

Now the Iowa statute goes even further, and instead of saying *fix conditions*, it says *fix rates*. So on the basis of the U. S. case, whichever way fix should be construed whether to fix by compulsion or fix by agreement, it would be sufficient to bind the utility.

See also *State ex rel., Western vs. Superior Court*, 19 L. R. A. 1915 C, page 291, where the court says:

> "The power to *fix* rates if exercised by a city, unless that power is clearly expressed by a legislative grant, is in the nature of a license, and revocable at the will of the legislature."

A reading of the case will show that the word is used in exactly the same sense as in the Iowa Statutes, for the question in the case is whether a binding contract existed because of this fixing of rates, and the court held that the contract was binding only until such time as the Public Utility Commission had acted, because there was no express power to *fix rates*.

See also P. U. R. 1918 F, Note on page 694, holding that the New York Commissioners are without jurisdiction to increase the rates of a Street Railway where fixed by franchise or contract, with a city, except on the consent of the municipal authorities. International R. Co. (1918) 104 Misc. 46, 171 N. Y. Supp. 193.

See also *Dawson vs. Dawson Telegraph Co.*, 137 Ga. 62, 72 S. E. 508, where the court held:

> "That granting of a franchise to a telephone company by an ordinance passed by the municipal authorities of a city, wherein it is provided that the company 'agrees and binds itself by this ordinance that the rates charged shall be $1.50 per month for residence phones and $2.50

per month for business phones,' and an acceptance of such franchise by the company, does not prevent the telephone company from increasing such charges, if permission to do so is subsequently granted it by the Railroad Commission; *especially as it appears that the city was not specifically authorized by its charter, or other legislative enactment, to fix the charges to be made by telephone companies* * * * The order of the Railroad Commission does not violate the provisions of the state and Federal Constitutions, prohibiting the impairment of the obligations of contracts."

This situation shows that it is the lack of the authority to fix charges which makes the contract lacking in binding force upon the utility commission. If the word there "fix" means to contract, then it should mean that in the Iowa statute also.

The above again shows that it is the lack of authority to *fix* charges which makes the contract lacking in binding force upon the Utility Commission.

That the state can delegate to a city both the right to regulate and contract or fix there can be no further question. *Cedar Rapids Gas Light Company vs. Cedar Rapids*, 223 U. S. 655, 562 Ed. 594. A construction that the Statute only authorizes a legislative regulation holds the words "and fix" to be surplusage, repetious and redundant and clearly disregards the universal and well recognized rule of construction.

The Iowa Legislature has very clearly expressed itself as to its understanding of the power of cities under their statutes. For instance with Street Railways Sec. 767 of the Code of 1897 provided that "Cities and towns shall have the power to authorize and forbid the construction of street railways." Section 776 provided that no such franchise should be granted without being voted upon and Sections 955, 956 and 959 simply further define the manner of the granting. At no place in these sections is it said that a city may "regulate and fix" or is any language of a similar import used but we find the 29th Gen. Ass. in Sec. 2033d of the Code of 1913, saying

"Cities and towns and cities acting under special charters shall have power to authorize and forbid the construction of such railways upon, or over, or along the streets, alleys and public grounds within their limits and to prescribe the conditions and regulations under which said railways shall be constructed and operated within said limits. But the right to operate as a street railway under section three of this act shall not be granted for a period exceeding twenty-five years. Nothing herein shall impair the obligation of contracts of such city or town heretofore made. This act shall not in any manner affect sections seven hundred seventy-five and seven hundred

seventy-six of the code, which shall be applicable to interurban railways. (29 G. A. ch. 81, Sec. 4.)"

Notice that the legislature directly recognized the right of the city to contract under the statutes of the code of 1897 by the use of the language "Nothing herein shall impair the obligations of contracts of such city or town heretofore made."

This legislature, the bench and bar and the public in general believed that a franchise was a valid and binding contract.

That the smaller cities of Iowa, such as Chariton, must have both powers is an absolute necessity, and I use the term "absolute necessity" advisedly.

This is a city of the second class and has a population of about 6000. It collects about $7000.00 on a ten mill levy which is the legal limit of the levy permitted for its general fund. Out of this fund must be paid all of the general expense of the city government and the cost of this and other litigation. In the argument of this case I informed the trial court that the city would never try this case on its merits and such is the fact. This is true for the reason that the expense of such a suit is prohibitive.

In this connection I desire to direct the court's attention to the fact that the Appellant Company, as set out in their bill of complaint, furnishes its product to the Cities of Chariton, Lacona, Russell, Lucas, Woodburn, Osceola, and the farmers along the route to the towns, to coal mines and railroad companies, all at different rates. Its contracts with farmers, mine operators and railroad companies are surely binding and they may pay a less or greater rate, or their losses may be greater and gains less. I have no way of knowing. But it will be observed that they claim they should be allowed a rate which will furnish a reasonable return on the capital invested, and not a rate which will reasonably pay for the product furnished.

In order to reach a conclusion on the merits it becomes necessary to find the cost of furnishing the product to Chariton and the return which they get for it. This must be compared with the cost of furnishing to Lucas and the return for it and that with the cost of transmitting it 30 miles further to Murray and the return for it, and so on all through the piece. And this will require the services of engineers and accountants to determine values of the different properties in the different cities and measure the different costs. And this labor is so great and so expensive that the entire revenue of the General Fund for one year would not pay it. As the court must know this is the first cost. It is "absolutely impossible". For this same reason it is absolutely impossible for the city to regulate down, and this fact is well known to the Appellant and all other utility companies, and those who finance them.

This, together with the fact that the inhabitants of all cities want the product of these companies and are not willing to put them out of business, is their safety. Otherwise they would never organize and operate.

But it may be said, "the city can grant another franchise." No, we can't, the law gives us the right but no one would have it. Without the street lighting contract the business would not pay and it will be noticed that the Appellant does not contend that the franchise is not valid as to that contract. It is good for the entire 25 years and they will enforce it. Neither can the city build its own plant. It must fullfil the street lighting contract with the company and that contract takes the entire five mills which the city is permitted to levy for electric light purposes and leaves the city in debt to the company so there is no money to pay for building a plant and none to bond.

Appellant's analysis of this ordinance, beginning on page 23 of this brief strikes one as being very amusing at first reading but when we recall the fact that the greater part of the inhabitants of the cities and towns which they supply still use coal oil lamps because of the expense of electricity the feeling of amusement gives way to one of bitterness. Notice the language, "This section also declares that the city shall not purchase current from others than the grantee during the period of the grant." This, they say, is a contract. Some parts are contractual in nature and some are legislative grants, none of which can be changed excepting Section 3, which is merely a temporary regulation, according to their interpretation. They hold to the right of the use of the streets of this city and stoutly maintain that the agreement for lighting those streets at a certain fixed rate is a binding contract, in short they claim that each clause which grants them any privilege or right must not be disturbed, but that they have the right to have the only section in the franchise which seeks to protect the inhabitants of the city who gave the grant changed.

It is just such conduct which has made the public in general suspicious of and disrespectful to all corporations, both the good and the bad, and in all due respect to the Iowa court which has, since the time of the rendering of the opinion of the Hon. Martin J. Wade, in this case, decided that Iowa cities do not have the right to contract, the public cannot be censured for giving vent to very bitter criticism of that court.

For instance in this particular case Mr. Perrigo made his proposition to these people. He advertised in the papers, distributed hand bills, displayed large posters and compared the rate he was offering with that which the people were paying in this and other cities. He had his paid agents canvassing each voter. Public meetings were held. Men reasoned, argued and fought over the proposition. The best of friends fell out and all of the time the prize held before the voter was

a rate of one cent less than he had been paying. And now this same voter is told by Appellant Company that Perrigo did not mean it and it must be admitted that the Iowa court has now held that the voter, through his officers, could not make a contract for this rate.

CITIES CAN BE DELEGATED BOTH THE RIGHT TO REGULATE AND CONTRACT.

Counsel for Appellant argues that the city cannot have the right to regulate and to also contract, that the act of the legislature in providing that the power to regulate and fix should not be abridged by contract shows conclusively that there was no attempt to grant the power to contract.

The very mention of the word contract in the same sentence with the words ordinance and resolution shows that the legislature recognized the right to contract, and it might just as well be said that the legislature prohibited the right of the city to pass an ordinance or resolution as to say that this clause prohibits the right of a city to contract. In other words the statute says "and these powers shall not be abridged by ordinance, resolution, or contract." Now if it is reasonable to conclude that the city cannot make a contract as to rates why not also conclude that the city cannot pass an ordinance or resolution in respect to them? All these words are used in exactly the same way and why apply the prohibition to one of them?

But, counsel for Appellant urges, that the power to regulate and contract cannot both be possessed by the city.

The law is well settled to the contrary.

It will surely be conceded that the state always retains the police power to regulate and can grant franchises containing rate conditions which, when accepted, become contracts upon the part of the donee precluding them from charging greater rate than that agreed upon.

This being the case, is there any law prohibiting the state from delegating both powers to the city?

The cases are numerous on the subject and it is settled that the city acts for the state in making such contracts.

State ex rel. Indianapolis Traction Co. vs. Lewis, P. U. R. 1918, F. page 113.

> "Contracts, as are here in question, although entered into by the city, are nevertheless contracts for the state on the one side, and the utility on the other."

See also *re Muncie Electric Light Co.*, P. U. R. 1918 B, page 195, at page 200.

> "We think it inevitably follows that where a municipality has granted a franchise to a utility, the contracting parties are the state and the utility; and they may at any time, by a subsequent agreement, rescind or modify the existing franchise, or agree to its cancellation and the substitution of an entirely different one. *Sloan vs. State*, 8 Black. 361; *Wilcox vs. McClellen*, 185 N. Y. 9, 77 N. E. 986; *Tippecanoe County vs. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *La Crosse vs. La Crosse Gas & E. Co.*, 145 Wis. 406, 130 N. W. 530; *Gary vs. Gary Interurban etc.*, P. S. C. I. May 25, 1913.
>
> In the Wisconsin case it was said: "What the plaintiff (the city) did, if anything of a contractual nature, since it appertained to the franchise itself, the state did. What the two real parties to the transaction mutually did obviously they could mutually undo."

See also *re Gary & Interurban Ry. Co. et al.*, 1918 A, page 88, at page 95:

> "We are of the opinion that it inevitably follows that where a municipality has granted a franchise to a utility, the contracting parties are the state and utility, and they may at any time, by a subsequent agreement, rescind or modify the existing franchise, or agree to its cancellation, and the substitution of an entirely different one."

That the city can both regulate and contract is also well settled.

In the case of *City of Manitowoc vs. Manitowoc and N. Traction Co.*, 129 N. W. 925, the court held an ordinance containing a maximum for interurban rates became effective on acceptance. And this was the holding in spite of the fact that the court found the rate which was then in existence was unreasonably low and in spite of the fact that the state had created a commission with power to regulate rates, and the city's sole power as to rates was through its right to grant the use of its streets.

See also *Salt Lake City vs. Utah Light & Traction Co.*, 173 Pac. 558. P. U. R. 1918 F. page 337.

Wilkensburg vs. Pittsburg R. Co., P. U. R. 1918 F. page 148-149.

Quimby vs. Public Service Commission, 223 N. Y. 244; 119 N. E. 433.

Collingswood Sewerage Co. vs. Collingswood, P. U. R. 1918 C. page 261. (N. J.)

State ex rel. Tacoma R. & P. Co. vs. Washington Public Service Com., 172 Pac. 890. P. U. R., 1918 E. page 277.

Sausalita vs. Marten Water Power Co., P. U. R. 1916 A. page 244.

Los Angeles vs. Los Angeles Water Co., 177 U. S. 558.

Knoxville Gas Co. vs. City of Knoxville, 253 Fed. Rep. 223.

Where the utility was held bound but the city still had the right to regulate.

> "It is further insisted that the ordinance is not binding on the city, and hence could not be on the Gas Company, since the present or any succeeding law-making power of the city may change or repeal the ordinance outright. In other words, the contract made by virtue of the ordinance is unilateral, and hence voidable by either party. This contention I think is met and refuted in *Omaha Water Co. vs. City of Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614, where it is pointed out that municipal corporations have two classes of powers, the one governmental, in the exercise of which their officers may not bind the municipalities beyond their terms of office; the other business or proprietary, in the exercise of which they are governed by the rules as individuals or private corporations. The contract here is ordinancial in form, in the making of which I think the city officials were in the exercise of their business or proprietary functions. Under *Knoxville Water Co. vs. Knoxville*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887, it may be, if it appeared that by charging the maximum rate the Gas Company was realizing more than a reasonable return the city might require the Gas Company to charge less than the maximum rate named in the ordinance, since the contract only provides that the Gas Company shall never charge more than the rate named, and does not provide that it may not be required to charge less if the lesser rate appeared to be reasonable. That case is not authority for the insistence that the Gas Company, without the consent of the city, may charge more than the maximum rate, for which it contracted to furnish its patrons with Gas."

Knoxville Water Co. vs. Knoxville, 189 U. S. 436 stating "The contract between the city and the Water Company contained three distinct parts: First, the promise of the Company; next, those of the city; and last, the mutual understandings. In the first part the Company undertook as follows: 'Said Company will supply private consumers with water at a rate not to exceed 5 cents per 100 gallons.'"

"The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended, it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See *Georgia R. & Bkg. Co. vs. Smith*, 128 U. S. 174, 32 L. Ed. 377, 9 Sup. Ct. Rep. 47; *Ragan vs. Aiken*, 9 Lea, 609, re Am. Rep. 684. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city "by ordinance to regulate the price of water" which the company might supply. People who have accepted, as experience shows that people will accept, a charter subject to such liabilities, cannot complain of them or repudiate them, nor can the company which they have formed. *Rockport Water Co. vs. Rockport*, 161 Mass. 279, 37 N. E. 168. This consideration answers a portion of the company's argument as to its rights under the 14th Amendment, and makes it necessary to consider whether the regulation of water rates is properly to be classed as a police power. It also reinforces our interpretation of the instrument upon which the company founds its claim."

The above citations held that the city can contract and possess the power to regulate also.

See also the opinion of the trial court in this action Rec. page 47.

II.

THE UTILITIES ARE ESTOPPED FROM CLAIMING THERE IS NO CONTRACT.

Appellant's counsel contends that because the Iowa Supreme Court has, since the rendering of the opinion by the trial court in this action, held that the Iowa statutes do not give the right to contract the Federal Courts are bound by that construction, and must reverse the decision rendered by the trial court.

However the case may be on that issue the court now addressed will follow its own decisions on the question of estoppel and its own interpretation of the common law and it is the rule of the United States Supreme Court that the appellant company cannot get the electric light plant belonging to the city of Chariton, its business, and its property under a representation that it will not charge more than a certain

rate, keep that property and escape its solemn agreement under the plea that the contract is *ultra vires.*

As to the Iowa rule see *Beach & Wild vs. Wakefield,* 107 Iowa, 567; *Fidelity Ins. Co. vs. German Savings Bank,* 127 Iowa, 591.

State vs. Chariton Telephone Company, 173 Iowa, 497, is cited by appellant to show that the Iowa court does not apply the rule of estoppel.

Attention is directed to the fact that in that case the city sought to oust the telephone company and the further fact that the court found that the telephone company operated in the city under a direct grant from the state and not a grant from the city, both of which facts distinguish it from the case at bar, as will be noticed in the following citations.

I will simply quote from a few cases which cite many U. S. Cases rather than to attempt to set down the many decisions on the subject.

See *Muncie Natural Gas Co. vs. Muncie,* 60 L. R. A. page 822, in which the court says,

> "But even if there was a technical want of power upon the part of the city to enter into a contract establishing maximum rates for natural gas service, yet we do not think that appellant, while enjoying the fruits of the contract, can attack it, notwithstanding the fact that the law of *ultra vires* is stricter in its application to public than to private corporations. Counsel for appellant seem to think that the cases in this state are somewhat out of accord with those of the United States Supreme Court, which has followed the English cases. The leading case in the United States on this subject is *Central Transp. Co. vs. Pullman's Palace Car Co.,* 139 U. S. 24, 35 L. Ed. 55, 11 Sup. Ct. Rep. 478, wherein it is affirmed that partly executed contracts *ultra vires* the corporation itself are void as to both parties; that they cannot be affirmed by estoppel or otherwise, and that, where the parties have so far acted upon such contracts that they cannot be restored to their original situation, the court is limited to the granting of such relief, if any, as can be given independently of the contract. The declarations of the case mentioned are no broader than those found in *Tippecanoe County vs. Lafayette M. & B. R. Co.,* 50 Ind. 85, wherein it is declared that a corporate "contract *ultra vires* the charter is void, and cannot be made valid by any subsequent act of the corporation, because there is no residuary power to confirm it;" and that, "if the act is *ultra vires* the corporation, it is void, and no one is bound." That all power not expressly or impliedly granted to corporations is withheld is a rule that the authorities without division apply in testing the validity of

the purely executory contracts of corporations; but in so far as the defense of *ultra vires* to a contract that has been partly executed is concerned, we must look to the cases, rather than to the lexicographers, for a definition of the term *ultra vires*. Without attempting to cover the whole ground, it may be said that, if a contract is of such character that, had the corporation at once proceeded to execute it, its act would have been contrary to public policy, or expressly or impliedly prohibited by statute, or would, in a degree, disable the corporation from the performance of its statutory duties, the undertaking cannot be enforced by either party. To this extent the cases, English, Federal, and state, are in reasonable harmony. Citations * * *

On the other hand, we have a number of cases, commencing with the leading case of *State Bd. of Agri. vs. Citizens' Street R. Co.*, 47 Ind. 407, 17 Am. Rep. 702, in which it is held, on the principle of equitable estoppel, that, where there is a mere defect of power upon the part of the corporation to enter into the contract a defendant, while enjoying the benefit of the contract, shall not be permitted to raise the question as to the power of the corporation.

Citations * * *

The cases last cited are not seriously if in any respect, out of accord with the Supreme Court of the United States. *In Union P. R. Co. vs. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 41 L. Ed. 265, 16 Sup. Ct. Rep. 1173, it was pointed out that in a line of cases in that court, including *Central Transp. Co. vs. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55, 11 Sup. Ct. Rep. 478, the contracts condemned as void were against public policy, and it was held that a contract as to which there was a doubt as to whether it was within the implied powers of a corporation was not to be condemned because of a remote chance that in the future it would partially disable the corporation from performing its charter duties. The defense that a contract is *ultra vires* the corporation does not deserve the execration it has received, since in most instances there is a collateral remedy in cases where there ought to be one. Although such contracts are not necessarily illegal, the *ultra vires* doctrine has its roots, like the rule of *par delictum*, in public policy; and its chief value lies in the fact that it is a brake upon improper corporate action, more efficacious, perhaps, in its practical results than the public remedy by information. As to cases, however, of mere defects of power, we think that it should be held, in accordance with the clear weight of authority in the United States, that, while the defendant retains the benefit of the contract, the state alone can raise the question. Tested

by this consideration, we hold that, while the appellant continues to use the streets of the city of Muncie to distribute natural gas to private consumers by virtue of said accepted ordinance, it cannot question the right of the city to enter into such contract."

Belfast vs. Belfast Water Company, 98 Atl. 738. P. U. R. 1917 A page 317.

"But the defendant contends that the contract is illegal, null and void for three reasons:

(1) That is "ignores the right of the state to regulate and control the terms and conditions of service by fixing terms and conditions unalterably for all time;" (2) that it "ignores the principle that utilities must serve all alike on fair terms, by a provision that a large and important part of the service shall be rendered without compensation for all time after the expiration of twenty years;" and (3) that it "ignores the right of the state to levy taxes upon a just and reasonable basis by fixing for all time certain public service as the measure of all taxation of the company's property."

For these reasons the defendant claims that it is under no duty or obligation to furnish water to the city, and that it has a legal right to discontinue the water service to the city, unless and until the city will make arrangements to pay fair compensation.

The city takes issue with the defendant on all these propositions. But it contends, also, that the defendant is now estopped from denying the validity of the contract which it adopted, and the benefits of which it has received. It is also urged that if the contract was *ultra vires*, it was so only as to the city, and that the question of *ultra vires*, and the contention that the contract was against public policy, can be raised only by the municipality affected, and not by the other contracting party.

(1) It has been repeatedly held, and we think with good reason, that when a party has accepted the benefits of a contract, not *contra bonos mores*, he should not be permitted to question the validity of it; that he is estopped. *Ft. Worth City Co. vs. Smith Bridge Co.*, 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339; *Richardson vs. Welch*, 47 Mich, 309, 11 N. W. 172; *Doane vs. Lake Street Elev. R. Co.*, 165 Ill. 510, 36 L. R. A. 97, 56 Am. St. Rep. 265, 46 N. E. 520; *Collins vs. Cobe*, 202 Ill. 469, 66 N. E. 1079; *State ex rel. Pope vs. Germania Bank*, 90 Minn. 150, 95 N. W. 1116; *Gibbs vs. Graig*, 58 N. J. L. 661, 33 Atl. 1052; *Flower vs. Barnekoff*, 20 Or. 132, 11 L. R. A. 149, 25 Pac. 370; *Dyer vs. Walker*, 40 Pa. 157, 2 Parsons, Contr. 961. And in *Joy vs. St. Louis*, 138 U. S. 1, 34 L. Ed. 843, 11 Sup.

Ct. Rep. 243, where a railroad company was in the enjoyment of a right of way through a park, and had reached the benefit of a large sum of money expended by the park commissioners, under an agreement with them, the court said that, without offering to return the property obtained by virtue of the agreement, it could not be heard to allege that the agreement was against the policy of the law.

(2) Again, while it is true that in general the courts will refuse to enforce contracts *contra bonos mores*, there is good reason for saying that the defense of ultra vires can be made only by the party whose acts, or the acts of whose agents, are claimed to be ultra vires. The ultra vires contract of a municipality is a legal wrong. The party that is wronged may be relieved. The other contracting party is not wronged in the eye of the law. And it would seem that it cannot seek to be relieved, from a contract with which the other party is content. We have found no case where the other contracting party has been relieved, and no case where it has sought to be relieved, from a contract ultra vires a municipality. Ultra vires is properly a defensive proposition. It is a defense to an action seeking to enforce a contract. In every case, we think, it has been the municipality that sought relief. It is well settled that courts will not declare a statute unconstitutional except at the instance of those whose rights are injuriously affected by the unconstitutional provisions. They and they alone can do this. Courts will never, at the suit of one, pronounce a statute unconstitutional because it may impair the rights of others not complaining. *Williamson vs. Carlton*, 51 Me. 449; *Re Wellington*, 16 Pick. 87, 26 Am. Dec. 631; *Hingham & Q. Bridge & Turnp. Corp. vs. Norfolk County*, 6 Allen, 353; *Red River Valley Nat. Bank vs. Craig*, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703. And if an unconstitutional provision cannot be attacked except by one whose constitutional rights have been invaded, much more it would seem for like reasons that a mere ultra vires contract could be attacked only by the party as to whom it is ultra vires. The decisions of the Federal courts in national bank cases are illustrative. They point to the doctrine that the *ultra vires* transactions are utterly void when made the basis of suit to charge the bank with liability, but when the bank seeks to enforce advantages obtained through such transactions, even though they were impliedly forbidden, they are valid unless questioned by the government. *California Nat. Bank vs. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Union Gold Min. Co. vs. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432; *Union Nat. Bank vs. Matthews*, 98 U. S. 621, 25 L. ed. 188;

Reynolds vs. First Nat. Bank, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Schuyler Nat. Bank vs. Gadsden*, 191, U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129."

Appellant has sought the jurisdiction of the United States Courts and must submit to the rules thereof. The facts in the case at bar preclude the granting of relief by those courts.

In this connection it is well to bear in mind that there is no attempt to regulate on the part of the city. Appellants allege in their Bill of Complaint that the rates as set forth in Sec. 3 are the rates determined by the city which "would produce a return sufficient to pay a reasonable income on the amount of capital invested." Rec. p. 39.

But the Appellant sets out the ordinance and proposal in the same pleading and they show that the rate was determined by Perrigo. It was his ordinance and his proposal. He drew them to suit himself and made an offer to the city.

It will also be noticed that Appellant seeks to recover from the city by reason of the fact that there is a contract by which the city agrees to use power for pumping water. This contract was also a part of the ordinance and proposal. And in this very action Appellant also seeks to enforce that contract and retain the benefits thereof.

Surely the doctrine of estoppel will lie.

As to the allegations of hardship the court has definitely settled the issue in *Columbus Ry. & Power Co. vs. Columbus*, 249 U. S. 399. And the language used in that case, "Nor is there any allegation establishing the fact that taking the whole term together the contracts will be necessarily unprofitable."

III.

THE COURT IS NOT BOUND TO FOLLOW THE CONSTRUCTION PLACED ON THE STATUTE BY THE IOWA COURT.

At the time Appellant filed the Bill of Complaint in the Federal Court, and at the time that court decided adversely to the Appellant, there had been no construction of the statute by the Iowa Court.

It is not necessary to analyze the earlier Iowa cases cited by Appellant for none of them are in point. It is true that they contain dictum which might be read either way but they are not decisive. For instance in the case of *Iowa Ry. & Light Co. vs. Jones Auto. Co.*, 164 N. W. 780 (Iowa), the court said:

> "This section authorizes the council to fix compensation for services to be rendered, but in the absence of its exercise or of any *contract*, the company may fix and de-

mand reasonable compensation. Here the rate is defined by the terms of a franchise which is in the nature of a contract between the Company and the municipality, and the issue is, whether in agreeing not to exceed the compensation stated, meter rents are actually or impliably excluded."

A much stronger case is that of *Des Moines Street Railway Co. vs. Des Moines B. G. St. Ry. Co.*, 73 Iowa, 513, in which the court said:

"The ordinance appears to us to be reasonable and our holding is that under our statute which empowers cities to authorize or forbid the laying down of a street railroad track, a city council may make a reasonable provision by contract for present and future street railroad service and may secure the company contracted with against the impairment of its profits for a limited time and against interference with its extension during the time, if a larger and better or more immediate service can be thus obtained."

Other cases decided in Iowa prior to the time of the opinion by the District Court contain statements showing that it was commonly understood by both the bench and bar that the city could contract, and the announcement of the doctrine of *Town of Woodward vs. Iowa Ry. & Light Company*, 178 N. W. 549 created consternation and amazement throughout the state.

Just how this case which affected nearly every citizen in the State happened to get into the Supreme Court of Iowa and out without anyone knowing of its existence is impossible to understand, and it is most difficult to determine from the reading of the opinion as to just how the court justified itself in over-riding the law as determined by almost a unanimity of court decisions.

However the case may be it must be admitted that the *Woodward* case does construe the statute adversely to the city. But the Federal court can follow its own decision on the question of estoppel.

The cases of *Ottumwa Ry. & Light Co. vs. Ottumwa*, 173 N. W. 270 and 178 N. W. 905 are again up for consideration. What the final result will be is most uncertain.

Appellant quotes at length from *Burgess vs. Seligman*, 107 U. S. 20 (pp. 78, 79 Appellant's Brief).

Note the language used by the court in this case:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was

under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."

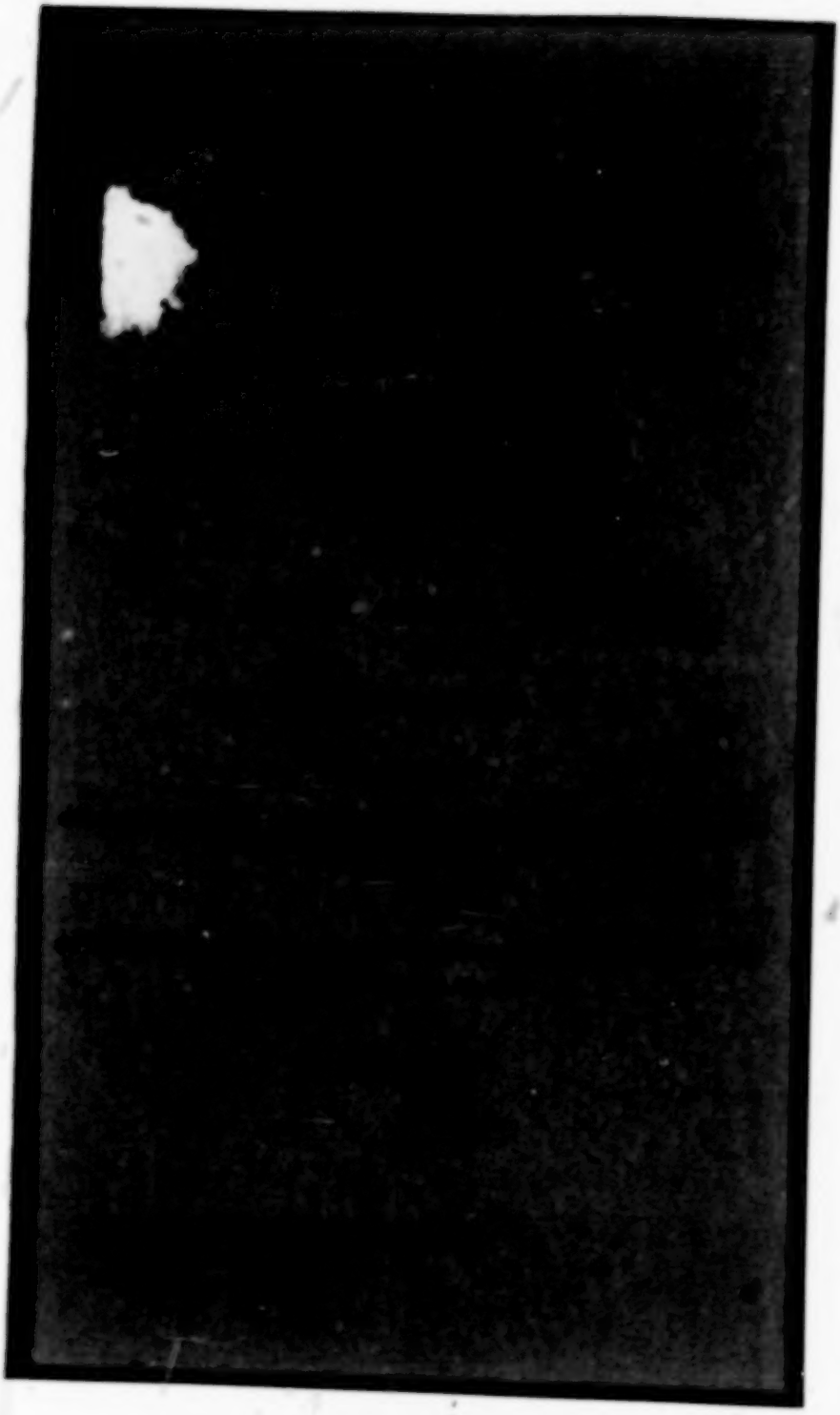
As heretofore stated, there had been no direct construction of Sec. 725 at the time the District court rendered the opinion in this action. The case of *Williams vs. Iowa Falls Electric Co.*, 170 N. W. 815, was decided upon the balance of convenience rule only and the court declined to construe the statute.

Again, under the rule of the *Seligman* case it is only when the question is "balanced with doubt," that the Federal Courts "lean" toward the views of the State court.

In this case there can be no question that the Appellant Company cannot come into this little city, take its plant and property under a plain and clear representation that it will not charge more than a certain rate during the life of the grant, seek to hold the city to the very letter of the franchise as to all benefits accruing to the Company and claim that they are not bound to carry out the only agreement made for the benefit of the city.

If they succeed in this action the people of this city are left wholly to their mercy.

H. W. BYERS,
J. W. KRIDELBAUGH,
Attorneys for Appellee.



(27,332)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 577.

IOWA ELECTRIC COMPANY, APPELLANT,

vs.

CITY OF FAIRFIELD, IOWA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Caption	a	1
Citation	1	1
Return of service on defendants	3	2
Bill of complaint	4	3
Subpœna and return	21	14
Resistance to application for temporary injunction	23	16
Proposed ordinance	24	16
Memorandum upon application for temporary injunction	33	23
Order appointing Wm. G. Raymond special master	35	24
Report of Wm. G. Raymond, special master	37	24
Memorandum by Hon. Martin J. Wade, judge	39	25
Order granting temporary injunction	42	26
Order granting temporary injunction	44	27
Order relating to issue in said cause	50	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 16, 1920.

	Original.	Print.
Memorandum opinion, Hon. Martin J. Wade, judge	52	30
Amended and substituted answer	62	36
Ordinance No. 192	64	37
Order setting cause for hearing	72	43
Memorandum of Hon. Martin J. Wade, judge	74	43
Decree	77	45
Application to continue restraining order	80	46
Petition for appeal	84	47
Assignment of errors	86	48
Order continuing restraining order	90	50
Order allowing appeal	93	51
Bond on appeal	94	51
Præcipe for transcript	96	52
Clerk's certificate to transcript	99	53

a Pleas and proceedings before Honorable Martin J. Wade, Judge of the District Court of the United States for the Southern District of Iowa, in a certain cause lately pending in the Ottumwa Division of said Court, at Ottumwa, Iowa, being numbered 4012-Equity, wherein Iowa Electric Company is Complainant and The City of Fairfield, Iowa, et al., are defendants.

Appearances:

Wm. Chamberlain, Cedar Rapids, Ia.;
John A. Reed, Cedar Rapids, Ia.;
Wm. Smyth, Cedar Rapids, Ia.;
Attorneys for Complainant.
X. C. Nady, Fairfield;
Ralph H. Munro, Fairfield;
Attorneys for Defendants.
Wm. C. McArthur, Clerk, P. O. Des Moines, Ia.

1 In the District Court of the United States for the Southern District of Iowa, in the Ottumwa Division.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MONROE, Mayor; J. W. PRICE, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, Defendants.

Citation on Appeal.

Filed Oct. 4, 1919. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

UNITED STATES OF AMERICA, *ss:*

To City of Fairfield, Iowa; R. H. Monroe, Mayor; J. W. Price, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 15th day of November, A. D. 1919, pursuant to an order allowing an appeal filed and entered in the clerk's office of the district court of the United States for the Southern district of Iowa, from a final decree signed, filed, and entered on the 15th day of August, 1919, in that certain suit, being in equity No. 4012, wherein Iowa Electric Company is plaintiff and you are defendant and appellee, to show cause, if any

there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

2 Witness the Honorable Martin J. Wade, United States District Judge for the Southern District of Iowa, this 25th day of Sept., 1919, and of the Independence of the United States 144".

MARTIN J. WADE,
U. S. District Judge for the District of Iowa.

3 STATE OF IOWA,
Jefferson County, ss:

M. S. Randall being duly sworn on oath says: I am Deputy Sheriff in and for said County; I hereby certify and return that I received the foregoing Citation on Appeal for service on the 29th day of September, 1919, and on the same day I served the same upon the City of Fairfield, Iowa by reading said notice to R. H. Munro, Mayor of said City and delivering to him personally a copy thereof and upon R. H. Munro, Mayor, J. W. Price, Lon Israel and W. H. Connor, Councilmen, and X. C. Nady, City Attorney, by reading the same to each of them and delivering to each of them personally a copy thereof and upon the same day served the same upon J. F. Dearduff, Councilman, by leaving a copy thereof with — Dearduff, his wife, a member of his family and a person over fourteen years of age; I further certify and return that I served the same upon W. R. Baker, Councilman, on September 30th, 1919 by leaving a copy thereof with his wife — Baker, a member of his family and a person over fourteen years of age—neither said Dearduff nor Baker being found in my County. I further certify that F. H. Simpson, one of the defendants named in the said Citation, died in said City since the commencement of said action.

All done in the City of Fairfield, Jefferson County, Iowa on the dates above mentioned.

M. S. RANDALL,
Deputy Sheriff.

Subscribed and sworn to before me by M. S. Randall this 30th day of September, 1919.

Witness my hand and seal notarial.

[Notarial Seal J. S. McKemey, Fairfield, Iowa.]

J. S. McKEMEY,
Notary Public.

Fee Bill:

Service	$2.25
Copies	1.60
Mileage	.80
	$4.65

4 Be it remembered that on the 15th day of May A. D. 1918 there was filed in cause No. 4012-Equity Ottuma Division a Bill of Complaint in the case of Iowa Electric Company vs. The City of Fairfield, Iowa, et al., which said Bill of Complaint is in words and figures as follows to-wit:

In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MUNRO, Mayor; J. W. PRICE, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney; R. H. Monroe, W. H. Conner, W. R. Baker, Defendants.

Bill of Complaint.

Filed May 15, 1918. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

To the Honorable Judge of the District Court of the United States, Southern District of Iowa, Ottumwa Division:

Iowa Electric Company brings this, its Bill of Complaint against the city of Fairfield, Iowa, R. H. Munro, Mayor, J. W. Price, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, R. H. Munro, W. H. Conner, W. R. Baker, and further says, that said city
5 of Fairfield, is a city of approximately 6,100 inhabitants, many of whom, the exact number not being known to your orator, are tax-payers, that there are also residing in said city approximately 1,000 persons, who are consumers of gas furnished by your orator. That it is impossible for your orator to join each of said inhabitants, tax-payers and consumers as parties defendant in this action and therefore R. H. Munro, W. H. Conner, W. R. Baker are made parties defendant to this action as representatives of each of the three classes of persons hereinbefore mentioned and your orator further says, that the given names of the above named defendants are unknown to your orator and thereupon your orator complains and alleges:

I.

That your orator is a corporation created, organized and existing under and by virtue of the laws of the State of Iowa, and is a citizen of the State of Iowa having its principal office and place of business in the city of Cedar Rapids, Iowa.

II.

The city of Fairfield is a municipal corporation being a city of the second class duly organized under the provisions of the Statutes of Iowa and said city has a population of upwards of 6,113 inhabitants and its legislative and executive powers are vested in and exercised by the Mayor and City Council, consisting of a Mayor and six councilmen above named, each and all of whom were the Mayor and councilmen of said city of Fairfield from and after the month of April, 1917 up to the time of the filing of this Bill of Complaint, and said defendant X. C. Nady is the City Attorney of said city of Fairfield and as such, is charged with the duty of enforcing the provisions of ordinances of said city of Fairfield.

6

III.

The amount involved in this controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00), and this controversy involves the construction of certain provisions of the Constitution of the United States, to-wit:

1. Those prohibiting the taking of complainant's property for public use without just compensation therefor, to-wit the Fifth and Fourteenth Amendments thereto.

2. Those prohibiting the taking of its property without due process of law, to-wit the Fifth and Fourteenth Amendments thereto.

3. Those guaranteeing complainant equal protection of the law, to-wit the Fourteenth Amendment thereto.

IV.

That on or about the 15th day of December 1916, the defendant city of Fairfield, being then as now a city of the second class and having a Mayor and City Council, duly granted to William G. Dows, Isaac B. Smith, John A. Reed and to their successors and assigns, a franchise for a term of twenty years from and after its acceptance, to acquire, erect, maintain and operate a gas plant in the city of Fairfield and to use the streets, avenues, alleys, public places of the city for the purpose of laying down and maintaining a system of pipes for the purpose of distributing said gas to the said city and its inhabitants for light, heat and fuel purposes.

V.

That said franchise was duly submitted to and approved by the legal voters of the city of Fairfield at a special election duly called and held for that purpose on the 30th day of January A. D. 1917 and said franchise was duly accepted in writing by the said William

7 G. Dows, Isaac B. Smith and John A. Reed in the manner and form required by the Ordinance granting said franchise and by reason of the passage, approval and acceptance of said franchise as aforesaid said franchise became a legal and binding franchise of the said city of Fairfield, and your orator says, that said franchise has never been repealed and is now in full force and effect and your orator says that it purchased from said William G. Dows, Isaac B. Smith and John A. Reed, the said franchise and all of the rights, powers and privileges thereby granted to and conferred upon them and received an assignment thereof in writing and that your orator is still the owner of said franchise and said rights and that after said date last above named your orator acquired a gas plant and distribution system located in the city of Fairfield and which gas and distribution system furnished gas for light, heat and fuel purposes to the said city of Fairfield and its inhabitants, and ever since the purchase of said plant and franchise, has continued to operate said gas works up to this time and to furnish the said city of Fairfield and its inhabitants with gas for light, heat and fuel purposes, and your orator says, that it is now rightfully, maintaining and operating said gas plant and distribution system in said city of Fairfield, Iowa.

VI.

Your orator further says that Ordinance No. 192 of said city of Fairfield fixes maximum rates which may be charged for gas service rendered to the said town and its inhabitants as follows:

"For the first 3,000 cubic feet, $1.375 per thousand cubic feet.
For the next 3,000 cubic feet, $1.325 per thousand cubic feet.
For the next 6,000 cubic feet, $1.275 per thousand cubic feet.
For the next 6,000 cubic feet, $1.20 per thousand cubic feet.
For the next 6,000 cubic feet, $1.10 per thousand cubic feet.
For the next 6,000 cubic feet, $1.05 per thousand cubic feet.

"For all consumption over 30,000 cubic feet, $1.00 per thousand cubic feet; provided however, the gas company will be allowed to charge a penalty of five cents (5¢) per thousand cubic feet
8 if the consumer fails to pay his bill at the office of the gas company on or before the tenth (10th) day of the month succeeding that for which the bill is rendered. Prepay meters shall be installed on request.

"The said gas company is also authorized to charge and collect the sum of twenty-five cents (25¢) for a minimum amount of gas used on each meter installed, and until written notice has been given to the company by the owner of the premises of the customer to remove the meter from the premises.

"The rates which grantee is entitled to charge for services from and after three (3) years after the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa."

And your orator further says, that it has charged for service furnished by it at and in the city of Fairfield in accordance with the aforesaid rates from the first day of March, 1917, up to and including the 30th day of April, 1918.

Your orator further says that during the aforesaid period said rates have failed to produce a reasonable and fair return of net profit upon the actual value of your orator's necessary plant and equipment used and useful in furnishing gas service to the said city of Fairfield and its inhabitants and the actual revenue received by your orator from such service during the said period by it, was insufficient to pay the actual operating expenses and taxes of your orator, set aside an amount equal to the actual annual depreciation and impairment of your orator's property as aforesaid and to leave to your orator any sum whatever as an earning upon the actual value of your orator's necessary plant and equipment used and useful in furnishing said service as aforesaid.

Your orator further says that during the eighteen months last past, the cost of gas coal, steam coal, metals, oils and other essential materials used and consumed in the manufacture and distribution of gas have increased from twenty-five to one hundred per cent; that the amount of labor and cost of labor per hour have also largely increased, all of which has resulted in an increase in the cost in the manufacture of gas to your orator, and that said increase, at the time of filing this Bill of Complaint is not less than forty cents (40¢) per one thousand cubic feet greater than the cost to your orator during the period ending eighteen months prior to the filing of this Complaint; that this increased cost is due to the unprecedented demand for all such materials arising from the state of war which now exists, and the fixing of prices for coal by the President of the United States, through the Fuel Administration, by authority of the Act of Congress, commonly known as the "Food Survey Law and Food Control Law," approved by the President on August 10th, 1917, and the fixing of prices of other commodities for Government use by the several departments of the Government, and your orator further says that there is no reasonable prospect of any decline in said prices during the continuation of said war or for a prolonged time thereafter.

9

Your orator further says, that after acquiring said plant that it expended large sums of money in placing said plant in good operating condition and after placing said plant in good operating condition it operated same carefully and economically but said plant, at the rates hereinbefore set out would not and will not produce sufficient revenue to pay operating expenses, taxes, depreciation and leave any sum whatever as a return to your orator upon the fair and reasonable value of your orator's property used in furnishing said service as hereinbefore set out and your orator upon ascertaining said facts, during the months of January, February, March, and April, presented to said city council of said city and its individual members statements of the earnings and operation of said plants showing said facts and petitioned said council to take such action as would authorize your orator to charge higher rates than those hereinbefore set out, for said gas service and rates, which would furnish to your

orator a gross revenue sufficient to pay operating expenses, taxes, depreciation and a fair return of net profit upon the value of your orator's property used in furnishing said service as aforesaid, but said city council did not grant said application.

VII.

That on or before the first day of May, 1918, your orator forwarded to each of the consumers of gas at and in said city the following letter:

"Fairfield, Iowa,
April —, 1918.

"To Our Customers:—

"The war has increased the cost of living and doing business to everybody. Everything you buy costs more and the Iowa Electric Company has suffered the same as you have, especially in its gas business and it must continue to pay these increased costs for it cannot economize 'by doing without things.' It uses no luxuries which can be dispensed with. All of its purchases are necessaries, for gas is only coal, oil and labor manufactured into an article for your use.

"We are now paying increases of $— per ton or $— per year for gas coal and $— per ton or $— per year for furnace coal and $— per month and $— per year for gas house labor over what was paid to operate our gas plant when we asked for our franchise.

"The increase in cost of living and doing business in most cases has been met by everybody increasing the cost of what he sells, be it merchandise or labor, that is, everybody except the Iowa Electric Company. It has borne its losses silently for more than a year hoping that prices would become normal. It appears that no relief is in sight. The war may last for years. The increases in the price of coal have been approved by the Government. Labor will go even higher owing to the army draft and it is necessary that we turn to our customers and ask that they help by paying a temporary increase in rates of 22½¢ per 1,000 or $1.60 per 1,000 net until the end of the war or until costs become normal and no longer. This increase will net us about $2,700.00 per year while our increased cost is $— per year, and in addition we pay.

"Other cities in Iowa have come to the relief of their gas companies by increasing rates; Grinnell has raised its rates to $1.90; Marengo to $1.85; Waverly $1.65; Ames $1.65; Iowa Falls $1.75; Oelwein $2.15.

"If you use other fuel in place of our gas you would be subject to high costs, much greater than the increases which we are asking you to pay. It is impossible for us to give you the good service you want and the good service we desire to give you unless we charge a rate which will give us sufficient funds to pay the cost of service and the maintenance of our property. President Wilson has said the maintenance of the gas and electric service is necessary to the successful conduct of the war and in February in a letter to Secretary

McAdoo says: 'It is essential that these utilities shall be maintained at their maximum efficiencies, that everything reasonably possible should be done with that in view. I hope that state and local authorities where they have not already done so, when the facts are laid before them will respond promptly to the necessities of the situation.'

'I should be glad to have you communicate with the
11 local authorities whenever the information in your possession suggests that such a course is desirable and in the national interest.'

"The company will bill for all gas service furnished after May 1st, at $1.60 per thousand cubic feet and respectfully hopes for your co-operation.

"IOWA ELECTRIC COMPANY,
By C. S. WOODWARD,
"Secretary."

And thereupon the city council of the defendant city at the regular monthly meeting held May 6th, 1918, passed a resolution directing the city attorney to,

"start proceedings against the Iowa Electric Company, restraining them from raising the gas rates from $1.375 per thousand, to $1.60 per thousand cubic feet."

Your orator further says, that on or about the 1st day of July, 1914, it made an issue of its First Mortgage Gold Bonds, the payment of which is secured by a Deed of Trust of the Company and Supplemental Deeds of Trust, conveying all of the property of your orator including the gas plant, distribution system and franchise under which your orator is now operating said plant and your orator further says that a substantial portion of the proceeds of the sale of said bonds was used in acquiring said gas plant and distribution system aforesaid and in the improvement of said gas plant, and said rates provided for gas service as herein set out will not provide any funds after the payment of operating expenses of said plant to pay any portion of the interest as same accrues on said bonds outstanding; that under the terms of said Trust Deed securing said bonded indebtedness, failure to pay installments of interest when the same are due, constitutes a cause for declaring the entire principal of said mortgaged indebtedness due, and for the immediate seizure of the mortgaged property, either by the Trustee named in said Trust Deed, or by a Receiver to be appointed by the court, pending the foreclosure of said Trust Deed, and unless your orator pays said interest when the same is due, the entire prin-
cipal of said bonded indebtedness will be declared to be due
12 and payable forthwith, and your orator's said property will be seized, either by the Trustee named in said Trust Deed, or by a receiver to be appointed by some court, and said mortgage will be foreclosed and the plant and property sold, thus resulting in large financial loss to your orator. Your orator further says that the going rate of interest upon money borrowed for the construction and

operation of public utilities is now in excess of eight per centum (8%) per annum and your orator knows of no place where a loan could be secured in an amount sufficient for the payment of said bonded indebtedness.

IX.

Your orator further avers that the legal rate of interest in the State of Iowa is six (6%) per centum per annum, that the rate of interest now being charged at and in the city of Fairfield for loans is not less than seven (7%) per centum per annum; that money cannot be obtained in Fairfield and vicinity for the benefit of its public utilities, but the same must be sought and obtained in the money centers of the United States, and owing to the unusual conditions incident to the state of war now existing, the cost of obtaining such funds, including interest is between nine (9%) per centum and ten (10%) per centum per annum; that the usual going rate of return demanded by investors in such properties upon the stocks of companies, subject to the business risks and hazards as are incident to the public utility business prior to 1916 was not less than seven (7%) per centum, and that at the present time it is impossible to market such stocks in sufficient quantities to provide for the financial requirements of the utility companies.

X.

13 Your orator further avers that the amount in controversy in this action cannot be determined from the gross or net revenue, it will receive for the furnishing of said gas service rendered by it to said city and its inhabitants but said amount in controversy greatly exceeds the amount of $3,000.00 for the reason that the said rates herein complained of materially interfere with the right of your orator to charge a reasonable rate for said service furnished to the said city and its inhabitants.

Your orator further says, that said right is of real and substantial value to your orator irrespective of the amount of charges fixed by said ordinance and that the right to charge fair and reasonable rates during that portion of your orator's franchise which is unexpired (eighteen years) is the real subject of dispute in this action and the object of this Bill is to preserve to your orator said right and the value thereof.

Your orator further says, that this value is not liquidated or fixed by law, but that said value is not less than Fifty Thousand Dollars ($50,000.00).

XI.

Your orator further says the gross revenue, operating expenses, taxes and net earnings, arising from the operation of its said plant in the city of Fairfield, under the rates herein complained of, from the

time your orator commenced to operate said plant, to-wit March 1st, 1917 to March 31st, 1918 as follows:

Gross Revenue	$18,270.13
Operation (exclusive of taxes & administration)	14,703.35
Taxes (estimated)	510.19
Administration	528.00
Total expense	15,741.54

Leaving a net earning of $2,528.59, without making any provision whatever, for the annual depreciation upon your orator's property used in rendering said service as aforesaid or return upon the
14 actual value of your orator's said property used in rendering said service.

XII.

Your orator further says, that the actual value of its property used and useful in carrying on its said gas business at and in the said city of Fairfield is not less than One Hundred Fifteen Thousand Dollars ($115,000.00) and that a reasonable annual charge for depreciation and other impairment including inadequacy and obsolescence of its said plant and equipment used in carrying on its said gas business in the city of Fairfield is not less than three (3%) per cent upon the said physical properties subject to depreciation as aforesaid, and that a fair and reasonable value of said physical properties subject to depreciation is not less than the sum of One Hundred Thousand Dollars, ($100,000.00). That a reasonable annual return upon the actual value of your orator's property used and useful in furnishing gas service in said city is in the sum of eight (8%) per cent of the actual value of said property of your orator used and useful in carrying on said gas business aforesaid, and your orator further says, that said net earnings for the year ending March 31st, 1918, were considerable less than the amount of said annual depreciation charge.

XIII.

Your orator further says, that its maximum average sales in the city of Fairfield does not exceed thirteen million cubic feet per annum and upon such sales, an additional compensation of not less than 75 cents per thousand cubic feet of gas sold will be required to furnish sufficient funds to pay operating expenses, annual depreciation and other impairment of the property of your orator and a return of eight (8%) per centum per annum upon the actual value of the property of your orator used and useful in carry-
15 ing on its said gas business in said city of Fairfield with the right to charge a minimum monthly bill of seventy-five (75¢) and an additional charge of ten cents (10¢) per thousand feet, if said bills are not paid within ten (10) days after being rendered.

XIV.

Your orator further says, that the provisions of said Ordinance No. 192 fixing said rates herein complained of should be held by this Honorable Court to be null and void and of no force and effect whatever, as against your orator for the following reasons:

1st. Because the said Ordinance if enforced would result in the taking of complainant's property for public use without just compensation therefore, for the reason that under the rate therein fixed the complainant would be obliged to produce and furnish gas to its consumers in said city at less than the actual cost to complainant of such gas and service and the value of complainant's plant as such would thereby be destroyed and the use and income thereof taken for public use without just compensation to complainant, contrary to the provisions of the 5th Amendment of the Constitution of the United States and the provisions of Section 18 of Article I of the Constitution of the State of Iowa.

2nd. That the enforcement of said Ordinance would result in the taking of complainant's private property without due process of law for all of the reasons set forth in this Bill of Complaint and particularly for the reason set forth under the preceding sub-division of this paragraph, contrary to the terms of the 5th Amendment to the Constitution of the United States and Section 9 of Article I of the Constitution of the State of Iowa.

3rd. That the enforcement of said Ordinance would result in denying to complainant equal protection of the laws for all of the reasons set forth in this Bill of Complaint and particularly those reasons set forth in the first and second sub-divisions of this paragraph contrary to the terms of Section 1 of the 14th Amendment of the Constitution of the United States.

4th. That said provisions so fixing the rates is void because it is an attempted abridgment of the continuing power of rate regulation over public utilities furnishing gas service, conferred upon cities and towns by Section 725 of the Supplement to the Code of Iowa (1913), which said abridgment is prohibited by the express terms of said Section 725, which is as follows, to wit:

"Sec. 725. Regulation of Rates and Service. They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations to furnish any person applying therefore, along the line of its pipes, mains, wires, and other conduits, with gas, heat, water, light or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light or power for other necessary public purposes, and to regulate and fix the rent or rates for water, gas, heat and electric light or power, to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution or contract."

5th. Because said provisions of said Ordinance undertake to fix the rates for a specified period of three years and it therefore deprives succeeding councils of the right to exercise the rate regulating powers conferred by Section 725, and to prohibit a re-adjustment of rates as the same may be necessary in order to fix a fair and reasonable rate for service according to conditions and circumstances as they may exist from time to time during the said three year period.

XV.

Your orator further shows the court that it has over one thousand consumers of gas in the city of Fairfield and that the monthly bills of a greater portion of said consumers are for small amounts, ranging from twenty-five cents to Two Dollars, (25¢ to $2.00) per month, and should your orator comply with the terms of said ordinance herein complained of and said ordinance should by this court be declared to be null and void, it would in practically all cases be impossible for your orator to collect the small sums due it from the consumers, for the reason that many of the consumers are transients, many others are judgment-proof and in all cases the costs of collection would be so great as to render collection unprofitable and your orator would be virtually compelled to lose the difference between the compensation fixed in such ordinance and a reasonable compensation.

17

XVI.

Your orator further alleges that unless restrained by an injunctive writ of this Honorable Court the defendants will attempt to enforce the provisions of said ordinance by a multiplicity of civil suits and by arrests, fines and penalties, unjustly, unlawfully and oppressively prevent your orator from charging a reasonable rate for gas service furnished its customers and against such unjust, unreasonable and oppressive action upon the part of the defendants and the class of persons of whom said defendants are representative, your orator has no adequate remedy at law and forasmuch as your orator can have no adequate relief except in this Court and to the end that the defendants and those classes of persons of whom the defendants are representative, may if they can show why your orator should not have the relief herein prayed for and to the end that the defendants and those classes of persons of whom the defendants are representative may answer your orator's bill according to the course of practice in this Court but not under oath, answer under oath being hereby expressly waived, your orator prays that it be declared by decree of this Court that the provisions of said Ordinance No. 192 of the defendant city of Fairfield relating to the rates of charge for gas service are in violation of the Constitution of the United States and of the Constitution of the State of Iowa for the reason hereinbefore stated and for such other and further reasons as may be found by your Honor to exist and that such ordinance be declared void and of no effect and that the operation of said ordinance be forbidden, restrained and suspended until final determina-

tion of this action and final decree herein and that the defendants and those classes of persons of whom the defendants are representative, and each of them be enjoined and restrained as follows:

18 That the city of Fairfield, Iowa, and each of the other defendants and those classes of persons of whom the defendants are representative and their successors in office be temporarily and permanently restrained and enjoined from any attempt to compel our orator, its agents, employees or representatives, to obey or comply with the terms of said Ordinance No. 192 relating to rates of charge for gas service and that the said city of Fairfield and the remaining defendants are representative, and their successors, in office be temporarily restrained and enjoined from taking or caused to be taken any step, action or proceeding against your orator or any of your orator's employees, agents, servants or representatives for failing or refusing to comply with the provisions of said Ordinance No. 192 relating to rates of charge or from charging or receiving for gas service more than prescribed therein and that said temporary writ of injunction be issued pending the trial of this suit according to the course and practice and out of and under the seal of this Honorable Court according to the statutes in such cases made and provided, and that upon final hearing of said action, said injunction be made permanent.

And your orator prays that it may have and recover judgment for its costs herein expended and that it have such other and further relief as the circumstances of the case require and is conformable to equity and good conscience; and that a Writ of Subpena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants and each of them commanding them and each of them upon a day therein named to appear and answer unto this Bill of Complaint, (but not under oath, answer under oath being hereby expressly waived,) and to abide and conform to such orders and decree in the premises as to the court shall seem meet and as is required by the principals of equity and good conscience.

WM. CHAMBERLAIN,
JOHN A. REED,
WM. SMYTH,
Solicitors for Complainant.

19 STATE OF IOWA,
State of Linn County:

John A. Reed, being duly sworn, says that he is the Vice-President of the Complainant, Iowa Electric Company, and as such officer of said company takes an active part in the management of the business affairs of said company and of the financial transactions thereof; that he has given the business of the Complainant at Fairfield, Iowa, a large amount of personal attention ever since March 13th, 1917, and is familiar with the transactions and operations of Complainant and of the property of Complainant at Fairfield, Iowa; that he has read the foregoing Bill of Complaint and that he is familiar with the facts therein stated and that the facts therein stated are true as affiant verily believes.

JOHN A. REED.

Subscribed and sworn to by the said John A. Reed, before me on this 14th day of May, A. D. 1918.

JOHN B. ANDERSON,
Notary Public in and for Linn County, Iowa.

20 And thereafter to-wit: On the 24th day of May, A. D. 1918, Subpœna in Chancery with Marshal's return of service was filed in said cause which is in words and figures as follows, to-wit:

21 *Subpœna in Chancery.*

(Endorsed:) Filed May 24, 1918. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

UNITED STATES OF AMERICA,
Ottumwa Division,
Southern District of Iowa, ss:

The President of the United States to City of Fairfield, Iowa, R. H. Munro, Mayor; J. W. Price, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilman; and X. C. Nady, as City Attorney; R. H. Munro, W. H. Conner, W. R. Baker.

We command you, and each of you, that you appear before the Judge of the District Court of the United States for the Southern District of Iowa, at Ottumwa, the fourth day of June, A. D. 1918, to answer to the bill of complaint of Iowa Electric Company this day filed in the office of the clerk of said Court, and then and there to receive and abide by such judgment and decree as shall then and thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the said Southern District of Iowa:

Returnable twenty days from the date hereof, to-wit, on the fourth day of June, A. D. 1918.

Witness, the Honorable Martin J. Wade, Sole Judge of the District Court of the United States, Southern District of Iowa, at the city of Ottumwa, Iowa, this the 15th day of May, A. D. 1918, and of the Independence of the United States the 143rd.

(Sgd.)
[SEAL.] WM. C. McARTHUR,
Clerk U. S. District Court,
Southern District of Iowa.
[SEAL.] By GERTRUDE DARRELL,
Deputy.

Memorandum.

The within named defendants are notified that unless they file an answer or other defense in the Clerk's Office of said Court on or before the twentieth day after service hereof, the complaint will be

taken against them as confessed, and a decree entered thereon accordingly.

[SEAL.] WM. C. McARTHUR,
Clerk U. S. District Court,
Southern District of Iowa,
By GERTRUDE DARRELL,
[SEAL.] *Deputy.*

(Endorsed:) No. 4012 Eq. Supœna in Chancery. District Court of the United States, Southern District of Iowa, Division Ottumwa. Iowa Electric Company, Complainant, vs. City of Fairfield, Iowa, R. H. Munro, Mayor, J. W. Price, J. F. Deardurff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, R. H. Munro, W. H. Connor, W. R. Baker, Defendants. Returnable 6-4 A. D. 1919. Wm. C. McArthur, Clerk. Wm. Chamberlain, John A. Reed, Wm. Smith, Comp'ts Sol.

Marshal's Return.

This writ came into my hands for service at Ottumwa, Iowa, on May 16, 1918, and service made as follows:

On City of Fairfield, Iowa, by delivering copy to R. H. Munro, Mayor of said city; and to R. H. Munro, as Mayor of the City of Fairfield, Iowa; to J. W. Price, J. F. Deardurff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and to X. C. Nady, as city attorney, of the City of Fairfield, Iowa, and to R. H. Munro, W. H. Connor, and W. R. Baker, personally, at Fairfield, Iowa, May 16, 1918.

Marshal's Fees.

Mileage 30 miles @ .06	$1.80
Service on 12 @ 2.00	24.00
	$25.80

NICHOLAS F. REED,
U. S. Marshal.
J. E. BEEMAN,
Deputy.

22 And thereafter to-wit: On the 22nd day of May, A. D. 1918, there was filed in said cause Objections and Resistance to Application for Temporary Injunction which is in words and figures as follows to-wit:

23 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MUNRO, Mayor; J. W. PRICE, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney; R. H. Munro, W. H. Conner, W. R. Baker, Defendants.

Filed May 22, 1918. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

Objections and Resistance to Application for Temporary Injunction.

Comes now the above named defendants, and each of them, by their attorneys X. C. Nady and Ralph H. Munro, and object to and resist the application for Temporary Injunction in this cause because of the following:

1. That on or about the 15th day of December, 1916, William G. Dows, Isaac B. Smith and John A. Reed, presented to the City Council of the City of Fairfield, Iowa, the following proposed ordinance:

24 *Ordinance No.* 192.

An Ordinance Granting Rights and Franchises to William G. Dows, Isaac B. Smith and John A. Reed, their successors or assigns, for furnishing gas for light, heat and fuel, to the City of Fairfield, Iowa, and the inhabitants thereof, and for acquiring, erecting and maintaining a gas plant in said City.

Therefore be it ordained by the City Council of the City of Fairfield, Iowa:

Section 1. That William G. Dows, Isaac B. Smith and John A. Reed, their successors or assigns, hereinafter designated as the grantee or the gas company, be and are hereby vested with the right, franchise and privilege for the term of twenty (20) years from and after the acceptance of this ordinance, to acquire, erect and maintain a gas plant in the city of Fairfield, Iowa, hereinafter designated as The City, for the manufacture and sale of gas for light, heat and fuel, and in connection therewith to use the streets, avenues and alleys of said city, and all streets, avenues and alleys that may hereafter be added thereto, for the purpose of laying down and maintaining in said streets, avenues and alleys pipes for the conveyance of gas in and through said city for the use of its inhabitants and the city and others, provided always that said gas pipes when so laid shall not in any manner interfere with the drainage of said city or the construction of

sewer or underground ways for the conveyance of water, or with any other improvement the city may make upon or in said streets, avenues, alleys and public places; and provided further that said gas company shall lay its pipes or mains, and make needed repairs and replacements therein and thereto, on streets which are being repaved or about to be paved in advance of the work of paving or repaving said streets, upon reasonable notice from said city; and provided further that nothing herein shall be construed as giving the said gas company an exclusive franchise or prevent the said city from granting any other company or gas companies franchises over the streets, avenues, alleys or public places of the city.

Section 2. That whenever said gas company proposes to open any streets, avenues or alleys for the purpose of laying down gas mains or pipes, said company shall give the city council, or member thereof having charge thereof, twenty-four (24) hours notice in writing of its intention so to do, which notice shall be accompanied by a plat, if requested, of the street, avenue or alley, upon which it proposes to lay its mains or pipes, specifying the proposed position its mains or pipe will occupy in said street, avenue or alley, the depth below the surface the same shall be laid, and the kind of material, the number thereof having charge of the same shall then give to said company its permit for so doing, and said company shall not unnecessarily during the progress of its work, obstruct the passage of such street, avenue or alley, and further shall within a reasonable time repair such portions of said street, avenue or alley, as it may have entered upon in such manner as it may have found it, such work of opening and closing said street, avenue or alley, to be done at all times under the supervision of, and subject to, the approval of the city Council, or member thereof, having charge of the same, or other duly constituted officer having charge thereof. All the foregoing provisions shall apply to entry, opening or closing of any street, avenue or alley for the purpose of connecting service pipes to the mains or pipes of said company at any time, and said company shall at all times be required to use all necessary means to repair streets or pavements of every kind so as to bring the same to grade and have same to grade at all times.

The gas company shall extend its mains for customers in all cases where bona fide customers apply in writing to be supplied with gas, and agree in their applications to purchase gas from the company, for use for light, heat or fuel, for a period of not less than two years, but there shall not be less than one customer for each one hundred (100) feet of main required to be laid to serve said applicants.

Section 3. The gas company in consideration of the rights, privileges and franchises herein granted to it, agrees to and shall furnish the inhabitants of the city, gas for lighting, heating and other purposes.

On bills rendered for monthly consumption, the rates shall be as follows:

For the first 3,000 Cubic feet, $1.375 per thousand cubic feet;
For the next 3,000 Cubic feet, $1.325 " " " "
For the next 6,000 Cubic feet, 1.275 " " " "
For the next 6,000 Cubic feet, $1.20 " " " "
For the next 6,000 Cubic feet, $1.10 " " " "
For the next 6,000 Cubic feet, 1.05 " " " "

For all consumption over 30,000 cubic feet $1.00 per thousand cubic feet, provided, however, the gas company will be allowed to charge a penalty of five cents (5c) per thousand cubic feet if the consumer fails to pay his bill at the office of the gas company on or before the tenth (10th) day of the month succeeding that for which the bill is rendered. Prepay meters shall be installed on request.

The said gas company is also authorized to charge and collect the sum of twenty-five cents (25¢) for a minimum amount of gas used on each meter installed, and until written notice has been given to the company by the owner of the premises of the customer to remove the meter from the premises.

The rates which grantee is entitled to charge for service from and after three (3) years after the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa.

Section 4. The company shall not be required to install a meter where the applicant therefor is indebted to the company for services previously rendered to him by the company.

Section 5. The gas furnished by the gas company shall be of not less than fourteen (14) candle power, of the equivalent of Standard English Sperm candles when tested on the London Metropolitan Burner, and not less than five hundred and fifty (550) British Thermal Units per cubic foot, and the monthly average shall not be less than five hundred and sixty-five (565) British Thermal Units per cubic foot, and the gas supplied shall at all times be practically free from sulphuretted hydrogen.

The grantee, if requested by the city shall at its own expense install and maintain in its works or office a calorimeter of standard manufacture or other device of equal efficiency for testing the quality of gas and the authorized agents of the city shall at all reasonable hours have access thereto for the purpose of conducting tests of the gas being furnished by the grantee so as to determine its quality. If the average number of heat units of the gas furnished by the grantee for any month as shown by weekly tests is less than five hundred and sixty-five (565) British Thermal Units per cubic foot, then the bills of all consumers for said month shall be reduced in the direct ratio which said deficiency bears to five hundred sixty-five (565).

The gas company, at its own expense, shall install in the city hall

a pressure gauge connected with the gas main in the streets,
26 which will indicate and record the pressure in the street main at all hours of the day. Said gauge to be in charge of a duly appointed official or employee of the city, and be maintained in constant operating condition by said official, or employee, so designated by the city.

The pressure shown by said gauge, in the city hall shall never be less than one and one-half (1½) inches nor more than seven (7) inches of water pressure and the daily variation of pressure at said gauge shall never be greater than one hundred per cent (100 per cent) of the minimum pressure.

Section 6. The gas and service furnished by said Company shall be further subject to such reasonable regulation and control as may be determined by ordinance of said city during the term of the franchise hereby granted.

Sec. 7. The city reserves the right to, by ordinance, provide the reasonable rules and regulations governing the manner in which the said gas company shall install its mains and connections and make repairs thereto.

Sec. 8. The privileges herein granted in the preceding Sections are made upon the condition that said gas company shall at all times, unavoidable accidents only excepted, hold itself in readiness to furnish, and shall furnish, all gas required by the said city, and the inhabitants thereof, as hereinbefore specified and shall at all times, fully insure, indemnify and save harmless the city of Fairfield, from all causes of action or litigation, or damage of any kind, claims for which may be made against the city, and from all loss or damage of any kind which may be sustained by any person, firm or corporation by reason of the present or future use or occupancy of any street, avenue or alley or by reason of defective, negligent or imperfect closing of all openings made by it in said streets, avenues or alleys, and shall permanently maintain good, complete and substantial gas works, and shall at all times conform with, submit to and carry out any ordinance now in force or that may hereafter be enacted not inconsistent herewith, for reasonably regulating or controlling the use of the streets, avenues or alleys, by said gas company.

Upon written demand of any consumer any meter shall be tested by the City in such a manner as the City Council may provide by ordinance and in case such meter shall be found to be incorrect to the extent of two per cent (2%) variation, or more, the expense of the testing thereof shall be borne by the grantee, and the account of the consumer for the three months next preceding the test shall be adjusted upon the basis of the error found on such inspection, but said company shall receive reasonable notice of the time and making of said test. In case such meter shall be found to be correct within two per cent (2 per cent) the inaccuracy shall not be considered an error and the cost of the test shall be borne by the consumer.

Section 9. The grantee shall at the request of the consumer, install by the side of the consumer's meter a printed card upon which the monthly readings of such meter and the date thereof shall be entered by the employee reading the same upon the date that the reading is made, and the meter reading shown upon said card shall be conclusive upon the grantee as to the state of the meter upon the date the same was read.

Section 10. This ordinance permits grantee herein, to purchase the existing gas plant in the City of Fairfield with all its appurtenances, rights and privileges, and as soon after said purchase as practicable grantee shall install necessary apparatus for making and proper purification of gas to ensure to the City and the inhabitants thereof an ample supply of gas of required quality.

Section 11. The grantee shall, and by acceptance of this franchise, agrees to expend within twelve months (12) from date of accept-
27 ance of its franchise at least Ten Thousand Dollars ($10,000) and shall within the following twelve (12) months expend an additional Ten Thousand Dollars ($10,000)—making an expenditure of at least Twenty Thousand Dollars ($20,000) within twenty-four months for the building, improving and extending of its plant and distributing system of its gas properties within the city of Fairfield.

Section 12. This ordinance shall be of full force and effect from and after its passage and adoption by the legal voters of Fairfield, Iowa, at the special election to be held Tuesday, January 30th, 1917, and the Mayor and City Clerk are hereby authorized and directed to do all things required by the Statutes of Iowa, and ordinances of the city for the lawful submission of the question of the passage and adoption of this ordinance to the legal voters of the city of Fairfield, Iowa, at said special election.

Section 13. The grantee herein shall within thirty days after the passage and adoption of this ordinance by the legal voters of the city file with the city clerk its written acceptance of said ordinance.

Passed this 15th. day of December 1916.

D. F. SPRATT,
Mayor.
W. R. HEFLIN,
City Clerk.

28 And said Dows, Smith and Reed requested the said City Council to adopt said ordinance and call a special election of the voters of said city to vote upon the same, and the said City Council did call and for that purpose hold a special election on the 30th day of January, 1917, in which a ballot containing said ordinance in full was submitted to the legal voters of said city upon the following interrogatory: Shall the following ordinance granting a gas franchise to William G. Dows, Isaac B. Smith and John A. Reed, their successors and assigns, be adopted?

2. That a majority of the legal voters of said city voted at said special election in the affirmative on said question, and on the 3rd day of February, 1917, the said Dows, Smith and Reed, filed their written acceptance with the Clerk of said City and the same was entered of record, as follows:

Acceptance of Franchise.

William G. Dows, Isaac B. Smith and John A. Reed, for themselves, their successors and assigns, do hereby accept the ordinance of the City of Fairfield, Iowa, entitled:

"An ordinance granting rights and franchises to William G. Dows, Isaac B. Smith and John A. Reed, their successors or assigns, for furnishing gas for light, heat and fuel, *the* the City of Fairfield, Iowa, and the inhabitants thereof, and for acquiring, erecting and maintaining a gas plant in said city, therefor," and the rights, powers and privileges conferred upon the said grantees therein named.

In witness whereof, the said William G. Dows, Isaac B. Smith and John A. Reed have duly executed these presents on this 31st day of January, A. D. 1917.

WILLIAM G. DOWS,
ISAAC B. SMITH,
By WILLIAM G. DOWS,
His Attorney in Fact.
JOHN A. REED.

29 3. That the said City of Fairfield, Iowa, or the City Council of said City is not now, and has not since the granting of said Franchise, attempted to establish the rate contended for, but are only attempting to enforce the contract entered into by the City and the said Dows, Smith and Reed, and their successors, the Iowa Electric Company, the plaintiff herein.

4. That because of the foregoing facts there is no Constitutional question involved, and hence no jurisdiction in this Court to grant the relief prayed, or any other relief.

5. The defendants, and each of them further aver that a short time prior to the presentation of said proposed ordinance by said Dows, Smith and Reed, as aforesaid, The Interstate Power Company's grantor, or assignor, R. M. Burtis, presented to the City Council of Fairfield, Iowa, an ordinance for a franchise for a similar purpose, and upon submission of said ordinance to the legal voters of said City the same was overwhelmingly defeated, and the said Burtis, who was President of the Interstate Power Company, assigned his rights under an old franchise, which was about to expire, to the said Interstate Power Company, who in turn assigned all of their rights to the said Dows, Smith and Reed, upon the condition that said Dows, Smith and Reed should be able to obtain a new franchise, and that one of the leading inducements published and held out to the said City and the legal voters thereof, to obtain said franchise, was that they and their successors would furnish gas at the rates specified in

said proposed ordinance for a period of three years from and after the acceptance of said ordinance by them, and said proposed ordinance would undoubtedly have been defeated at said election had it not contained said provision and condition, and it would not be equitable to now permit said grantees or their successors to retain said franchise without complying with the conditions and terms upon which they obtained the same.

30 6. And these defendants further aver that they have been informed and believe that in direct violation of said terms and conditions, and without the knowledge of any of these defendants, the said plaintiff and its officers and employees have been setting their pre-pay meters in such manner that their patrons were charged for gas at the rate of $1.48 per 1060 cu. ft. for gas consumed by them instead of the rate specified in said franchise, and that in violation of the said terms and conditions of said franchise the plaintiff has been charging the sum of 75¢ each for installing its meters for said patrons, whereas such charge is not permissable under said franchise.

7. That for the reasons set forth in the last two preceding paragraphs the said plaintiff is not coming into this court with clean hands, and is therefore not entitled to relief at the hands of any court of equity.

Wherefore the defendants pray that said application for a Temporary Writ of Injunction be denied, and that upon a hearing of said cause the complaint be dismissed at the costs of the plaintiff.

X. C. NADY,
RALPH H. MUNRO,
Attorneys for Defendants.

31 *Marshal's Return.*

The within objections and resistance came into my hands for service on the 20th day of May, 1918, and I certify and return that I personally served the same upon the within named Wm. Chamberlain, John A. Reed and Wm. Smyth by delivering to them a true copy of the same at Cedar Rapids, Ia., on the 20th day of May, 1918.

E. R. MOORE,
U. S. Marshal, Northern District of Iowa.
By M. L. HEALY,
Deputy.

We and each of us accept legal service of the within objection and resistance.

WM. CHAMBERLAIN,
JOHN A. REED,
WM. SMYTH,
Solicitors for Complainants.

32 And thereafter to-wit: On the 16th day of September 1918 there was filed in said cause Memorandum Upon Application for Temporary Injunction which is in words and figures as follows to-wit:

33 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

CITY OF FAIRFIELD et al.

Memorandum Upon Application for Temporary Injunction.

For the reasons stated in Memorandum Opinion filed in Peoples Light Company v. City of Davenport, there will be a temporary injunction allowed in this case. And with reference to the maximum rate to be permitted under such order, I am making the same order as in the Davenport case with reference to further showing. The Clerk will enter the following

Order.

And now on this 16th day of September, 1918, in the above entitled case, the application for a temporary injunction having been heretofore submitted, it is now ordered and adjudged that the plaintiff may, within five days file additional showing as to the maximum rate which should be allowed—copy of which shall be served upon the defendants by sending the same by mail to counsel for defendants; and defendants will have five days in which to file additional showing upon that issue.

Witness my hand this 16th day of September, 1918.

(Sgd.) MARTIN J. WADE,
Judge.

Filed September 16, 1918. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

34 And thereafter to-wit: On the 10th day of October A. D. 1918 there was filed in said cause an Order appointing William G. Raymond, Special Master which is in words and figures as follows to-wit:

35 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

CITY OF FAIRFIELD et al.

Order.

And now on this 28th day of September, 1918, in the above entitled case, William G. Raymond is hereby appointed Special Master to examine the affidavits and further showing on file herein, with reference to the maximum rate which should be fixed by the court in granting temporary injunction in this case; and upon such showing of the respective parties herein, the said Master will determine and report the maximum rate which, upon showing, the plaintiff shall be permitted to collect, pending final hearing herein. The Master in making such finding and report, will be guided by the fact that the plaintiff is entitled to an order permitting it to collect such sum as, upon the showing made, said plaintiff may be able to establish upon the trial as the maximum reasonable rate.

Such finding and report by the Master is intended as a guide to the court in determining said rate in its order for temporary injunction.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed October 10, 1918. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

36 And thereafter to wit: On the said day October 10, 1918, there was filed in said cause a Report by Wm. G. Raymond, Special Master, which is in words and figures as follows, to wit:

37 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

THE CITY OF FAIRFIELD et al.

Report of Special Master Appointed to Determine the Maximum Rate That the Plaintiff May be Permitted to Collect Pending Final Hearing Herein.

In the above entitled case, upon consideration of the showing of the respective parties on file, I find, that the maximum net rate which the plaintiff can fairly demand pending final hearing, is the sum of $2.00 per thousand cubic feet of gas sold; provided, however, that

there shall be a customer charge of 30 cents per month in addition to the charge for gas used, collected from each customer served through a standard meter, and that prepay meters shall be set to collect at a rate not exceeding $2.30 per thousand cubic feet, with no customer charge to be collected from customers served through such meters.

In lieu of the rate above given for customers served through standard meters, a maximum rate of $2.20 per thousand cubic feet without any additional customer charge may be fixed as that fairly to be demanded by the plaintiff, pending final hearing.

(Sgd.) WM. G. RAYMOND,
Special Master.

(Endorsed:) Filed October 10, 1919. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

38 And thereafter to wit: On the same day October 10th, 1918, there was filed in said cause a Memorandum by Martin J. Wade, Judge which is in words and figures as follows to wit:

39 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

THE CITY OF FAIRFIELD, IOWA, et al.

Memorandum.

In view of the radical difference between the claims of counsel as to what should be the maximum rate permitted pending final hearing, I appointed Dean William G. Raymond, Special Master, to go through the facts presented in the various statements and affidavits, and to make report to me of his findings, as to what maximum rate should be fixed. He has so reported. A copy of the Order, and of his Report, is hereto attached.

I have made an order in the usual form, providing for a bond which will fully protect all persons paying this maximum rate, if the same is not finally adjudged to be reasonable. The general rule is not to require a deposit of the money in a bank instead of securing the same by bond, without the consent of the parties. The Company is required to pay 6 per cent interest upon any money refunded, and it would not be just to require payment of interest upon money deposited in a bank. So that justice to both parties requires that the Company shall have the use of the money, and that the other party shall have ample security.

I have not included an order appointing a Master herein, for the reason that it is my present purpose to set this case for hearing upon

the issue presented by the pleadings as to whether the rate
40 fixed in the Ordinance, as plead by the defendant, is binding upon the plaintiff. I see no reason why, if the plaintiff cannot maintain the action because such rate is valid and binding, for putting the parties to the expense of going through a long hearing upon the rate question.

But before I make such order, I will receive from either party, objections to such order. By determining that question first, if it should be adverse to the plaintiff, the matter can be speedily presented to the higher court, and speedily determined. I would like to have such objections within five days.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed October 10, 1918. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

41 And thereafter to wit: On the same day, October 10th, 1918, there was filed in said cause an Order granting a Temporary Injunction which said order is in words and figures as follows to wit:

42 In the District Court of the United States for the Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

THE CITY OF FAIRFIELD et al.

Order.

And now on this 7th day of October, 1918, after full consideration of the facts and the report of the Special Master, it is ordered and adjudged that temporary injunction issue as prayed, conditioned that the plaintiff shall not collect in excess of 45 per cent advance upon the rates fixed by the ordinance upon conditions named in ordinance.

Conditioned however, that the excess collected over the present rates shall be deposited in a bank in the City of Fairfield (the plaintiff consenting thereto) to be held until final determination of the question as to what a reasonable and just rate is and to be returned to the consumer in such amount as may be over a fair, reasonable and just rate.

Counsel for plaintiff will prepare order and send copy to Counsel for defendant and endeavor to agree with Counsel as to bank to hold the funds and the condition upon which the bank shall hold the same as to interest, etc.,

Witness my hand,

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed October 10, 1919. Wm. C. McArthur, Clerk. By Gertrude Darrell, Deputy.

43 And thereafter to wit: On the same day, October 10th, 1918, there was filed in said cause an Order for Temporary Injunction which is in words and figures as follows to wit:

44 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MONROE, Mayor; J. W. PRICE, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady as City Attorney; R. H. Monroe, W. H. Conner, W. R. Baker, Defendants.

Order for Temporary Injunction.

On the 10th day of September, 1918, the Complainant, by its solicitors, John A. Reed, William Smyth and William Chamberlain, presented to me in Chambers at Davenport, Iowa, its bill of complaint under oath which is on file with the Clerk of this Court, wherein a temporary injunction is prayed upon the facts therein alleged against defendants, the City of Fairfield, Iowa, R. H. Monroe, Mayor; J. W. Price, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, R. H. Monroe, W. H. Conner and W. R. Baker as representatives of all the taxpayers and gas consumers within said City of Fairfield, Iowa, as a class, enjoining and restraining said defendants and each of them from enforcing an ordinance of the said City of Fairfield, Iowa, alleged to have been passed, approved and published by said City under authority of the laws of the State of Iowa on or about the 30th day of January, 1917, and now
45 in force, and it being shown that due and reasonable notice of the presentation of said Bill of Complaint to me in Chambers at Davenport, Iowa, on said 10th day of September, 1918, was served on all of the Defendants, the City of Fairfield, Iowa, and R. H. Monroe, Mayor; J. W. Price, J. F. Deardurff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, R. H. Monroe, W. H. Conner, W. R. Baker as representatives of all the taxpayers and gas consumers within said City of Fairfield, Iowa, and thereupon after argument by the solicitors of Complainant, the matter of issuing the Temporary Injunction herein was taken under advisement by the Court.

And now to wit on this 7th day of October, 1918, upon due consideration of said Bill of Complaint and facts therein alleged by the Complainant, it is ordered and adjudged that a Temporary Injunction issue against the Defendants and each of them and

their successors in office, and against all of the tax payers and gas consumers of the City of Fairfield, Iowa, as a class, forbidding them from putting into effect any of the provisions of said ordinance Number 192 of said City of Fairfield, Iowa, complained of in the Complainant's said Bill of Complaint or of any other ordinance of said City, wherein the rate or rates to be charged for gas by the Complainant in the City of Fairfield, Iowa, is less than the rate or rates specified in said Ordinance Number 192 of the said City of Fairfield, with forty-five (45) percentum of said rate or rates so specified in said Ordinance added thereto, said rates specified in said Ordinance being as follows, to wit:

"On bills rendered for monthly consumption, the rates shall be as follows:

"For the first 3,000 cubic feet, $1.375 per thousand cubic feet.

"For the next 3,000 cubic feet, $1.325 per thousand cubic feet.

46 "For the next 6,000 cubic feet, $1.275 per thousand cubic feet.

"For the next 6,000 cubic feet, $1.20 per thousand cubic feet.

"For the next 6,000 cubic feet, $1.10 per thousand cubic feet.

"For the next 6,000 cubic feet, $1.05 per thousand cubic feet.

"For all consumption over 30,000 cubic feet, $1.00 per thousand cubic feet; provided, however, the gas company will be allowed to charge a penalty of five cents (5¢) per thousand cubic feet if the consumer fails to pay his bill at the office of the gas company on or before the tenth (10th) day of the month succeeding that for which the bill is rendered.

"The said gas company is also authorized to charge and collect the sum of twenty-five cents (25¢) for a minimum amount of gas used on each meter installed, and until written notice has been given to the company by the owner of the premises or the customer to remove the meter from the premises."

And the said Defendant city, its officers, servants, agents, attorneys, and their successors in office, if any there shall be, are further enjoined and restrained until the final determination hereof attempting by criminal or other legal proceedings to enforce against the Complainant, its officers, agents and attorneys, or other employees any of the penalties provided for by any ordinance of the City of Fairfield, Iowa, which may provide penalties for the violation of said ordinance Number 192 complained of in Complainant's said Bill of Complaint.

It is further ordered that the said Writ of Injunction shall forthwith issue by the Clerk of this Court under its seal against the said City of Fairfield, Iowa, R. H. Munroe, Mayor; J. W. Price, J. R. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, R. H. Munroe, W. H. Conner, W. R. Baker as representing all the tax-payers and gas consumers of the said City of Fairfield, as a class named in the Bill of Complaint, enjoining said City of Fairfield, Iowa,

47 and all the other Defendants named therein; also all persons included in that class of persons represented by the said R. H. Munroe, W. H. Conner, and W. R. Baker, as hereinbefore ordered,

and forthwith deliver said Writ to the Marshal of this Court to be served by him on said Defendants.

It is further ordered that all sums of money in excess of the rates fixed in the Ordinance hereinbefore described, collected by the Complainant for the sale of gas within the City of Fairfield, Iowa, from and after the date of the commencement of this suit, shall be from month to month as collected, deposited by Complainant in the First National Bank of Fairfield, Iowa, as Trustee as funds in court. The Trustee shall pay interest upon said funds so deposited at the rate of four per cent per annum, provided that rate conforms to the present regular practice of allowing and paying interest upon savings accounts in the banks of the said City of Fairfield, Iowa, and such interest shall accrue to and become a part of said funds in Court.

If, upon final adjudication it is found that said Ordinance is void and of no force and effect that the amount collected is in excess of a just and legal rate, the Court will then order the Trustee to repay the persons paying the same all sums paid by them in excess of such just and legal rate together with the accumulated interest thereon, and the balance, if any, remaining in said funds will be paid to the Complainant or as this Court may order or direct. But in case it be determined upon final adjudication that said ordinance Number 192 is valid and that the rates therein fixed are lawful, then the Trustee will repay to the persons from whom sums have been collected in excess of the rates fixed in said ordinance Number 192 all of said excess together with the accumulated interest thereon.

48 It is further ordered and directed that said funds remain at all times as funds in Court subject to such further orders and directions as to the disposition to be made thereof, as shall at any time in the future seem to the Court to be just, fair and equitable, or as shall be demanded by the future proceedings of this cause.

Witness my hand this 7th day of October, 1918.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed October 10, 1919. Wm. C. McArthur, Clerk.

49 And thereafter to-wit: On the 19th day of October, 1918, there was filed in said cause an Order relating to the issue in said cause which order is in words and figures as follows to-wit:

50 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

CITY OF FAIRFIELD et al.

Order.

And now on this 19th day of October, 1918, for the reasons stated in memorandum this day filed in the Muscatine Lighting Company v. The City of Muscatin, the Court Orders and Directs, that the issue raised by the answer wherein it is pleaded that a certain ordinance rate is binding, and that the Court has no power to advance such rate, is set for hearing as a separate issue in advance of the hearing upon the question as to what is a reasonable and legal rate, and such issue as to the force and effect of the ordinance pleaded, will be heard at such time as the Court may hereafter fix.

To this order the plaintiff excepts.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed October 19, 1918. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

51 And thereafter to-wit: On the 24th day of March, A. D. 1919, there was filed in said cause a Memorandum Opinion by Martin J. Wade, Judge which is in words and figures as follows to-wit:

52 In the District Court of the United States for the Southern District of Iowa.

IOWA ELECTRIC COMPANY

vs.

THE CITY OF FAIRFIELD.

Memorandum Opinion.

(1.) I cannot do more at this time than to briefly record the conclusions which I have reached after the extensive and helpful arguments presented in these cases. Any attempt to review the wilderness of authorities cited, or to distinguish between apparently conflicting opinions of the Courts, would be fruitless, even if I had the time.

The most of the cases at bar involve the question as to whether a specific provision in a franchise ordinance fixing the price which shall be charged by the grantee of the franchise, is binding upon such grantee. It is not disputed that such provision is subject to

modification by the city under its general power to "regulate and fix" rates.

It is earnestly contended that the power to "regulate and fix," excludes the power of the city to contract. This may be granted
53 so far as a contract binding on a city is concerned; but I cannot agree that there is any limitation upon the power of the city to "regulate and fix" by contract, as well as by ordinance or resolution.

It is a general rule with relation to the exercise of power by a city, that "if the mode of exercise is not prescribed in the Act or Charter conferring the power, or in some other statute, the corporation may exercise the power in any usual and appropriate manner, according to its own discretion. 28 Cyc. 275, and authorities cited.

"This statute expressly confers on cities and towns, the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised, is left to the discretion of the corporation, subject however, to the general rule, that the ordinance must be reasonable. The power given in substance is to regulate, and this implies that the corporation is empowered to do all things essential to the proper exercise of the power expressly conferred." Davis v. Town of Anita, 73 Iowa, 325.

In the State of Iowa, a city is given the power to grant franchises without any limitation, except that such franchise shall not extend more than twenty-five years, and that no exclusive franchise shall be granted. When this law was passed, it was, and still is, the well settled rule, that "when a municipal corporation has the power to grant or refuse, in its discretion, permission to a public service company to occupy the streets with its structures, whether such permission be called a franchise, a license, a permit, or a mere designation of the streets to be occupied, it may grant such permission, subject to such conditions as it sees fit to impose." 19 R. C. L. page 1153, Par. 427. Of course such conditions must not be against law or public policy.

The city having the power to grant a franchise, the right to impose conditions, is limited only by the terms of the grant of the power. Therefore it is self evident that unless other legislation, and especially sec. 725 of the Code of Iowa, limits the power with
54 reference to conditions to be imposed in granting franchise, a provision as to maximum rates would be binding.

Section 725 confers the power to "regulate and fix", but it does not specify how such power shall be exercised; and under the rule above stated, it has the power to use its own discretion as to how such power shall be exercised.

In Miller v. City of Webster City — Iowa — 62 N. W. 648, Judge Deemer says:

"As the statute expressly confers upon the city the authority to establish markets and to provide for the weighing of commodities, and contains no limitations upon the power granted, the time, manner and expediency of its exercise, are left to the discretion of the corporation; and the judgment of its officers upon such matters can-

not be controlled by the courts, so long as they act within the scope of their authority. The discretion of a municipal corpoartion within the sphere of its powers, is as wide as that possessed by the government of the State, subject however, to the general rule that the ordinances must be reasonable. The action of the City Council in the exercise of expressly delegated powers, cannot be questioned upon the ground that it is in conflict with public interest."

The term "regulation" is very broad. It is said that an ordinance "is not so comprehensive as 'regulation', and is more solemn and formal than 'resolution' ". 28 Cyc. 348.

Judge Shiras in Kimball v. City of Cedar Rapids, 100 Fed. 802, uses the words, "A contract regulating the rates to be charged
55 by the Company."

It ought to be a fair inference that if the legislature intended to limit the exercise of the power to "regulate and fix", to conditions expressed by Ordinance, that it would have so stated. We must always bear in mind in dealing with municipal problems, that the powers of a municipality are not always exercised with formality, and I feel that this fact is kept in mind in the enactment of legislation for cities and towns.

Of course, any contract regulating rates, must be in the nature of things, "one sides," so far as the rate is concerned. This is true because the city reserve- to itself the power to change the rate at any time, subject only to the general rule that the new rate fixed must be reasonable.

But I see no objections to a contract understandingly made which provides that the city shall charge a maximum rate which shall continue until such period as the same becomes unreasonable, and that at such time the city reserves the right to modify the same.

Opposed to the foregoing views, counsel presents strong reasons in public policy, why the law should not be so construed. Of course, the matter of public policy can only be considered here, in an effort to construe the legislation. There are sound reasons in public policy, why the city should not be allowed to bind the corporation by a contract for a rate which does not bind itself; but there are other opposing reasons in public policy, which to my mind overcome every suggestion in support of the contention of the utilities companies. It is a matter of common knowledge that franchises are frequently granted—sometimes after spirited competition, and often after bitter controversy, which franchises contain a definite provision, that, during the term of the franchise, no more than
56 a certain sum named shall be charged for public service.

There can be no question, that heretofore, the people voting upon franchises, have believed such conditions to be valid, and I must assume that utility companies acquiring franchises containing such conditions, also assumed that such conditions were valid.

It is of the highest importance, that the confidence of the people in the law, and especially in the sacredness of contracts, shall not be weakened. Every franchise, and every power, under legislation, is construed most strongly against the grantee of a franchise. It is

self-evident that to now hold that conditions relating to rates solemnly agreed to are without force, would have a strong tendency to undermine the confidence of the public in the law, and would have a tendency to put utility companies under suspicion of repudiating their obligations.

There is much force in the suggestion, that regulation by contract should be permitted, especially with reference to smaller towns which cannot well afford the investigation and the trial of the question of the reasonableness of rates from time to time, and I believe it would be in the interest of said communities, to have a law permitting a contract binding both sides as to rates, for reasonable periods of time, say, three, or five years. This would stabilize conditions for the utility company and the city or town, and avoid expensive and unpleasant controversies.

It is of course important that utility companies shall receive reasonable compensation for what is furnished. Upon the showing before the Court, (which for the trial of this issue I assume to be true), it is apparent that some of these companies cannot continue under the contract rates, because they have no source of income, except the money received for the commodity furnished, and
57 war conditions have radically increased the cost of production, so that a rate fixed at the time a franchise was granted a few years ago, may be utterly inadequate at the present time to pay even current expenses; but these are conditions which the Court cannot relieve, as has been recently held in Columbus Co. v. City of Columbus, 253 Fed. 499, and other cases.

(2). But there are other considerations. These cases are brought upon the claim that because the rates are confiscatory, the utility companies are deprived by the State of property, without due process of law, and that they are denied the equal protection of the law.

The Fourteenth Amendment to the Constitution of the United States, provides—"nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of its laws."

The State, (and the municipality, which is an arm of the State) shall not "deprive any person," etc. At the foundation of these cases, is the problem as to whether upon the facts, the State, or the Municipality has deprived the utilities companies of property, without due process, or, whether the State or Municipality, is denying the "equal protection of its laws."

The courts are ever ready to enforce the provision of the Constitution of the United States; but in order to interfere with State or municipal legislation, it must appear that there is some affirmative act which constitutes the "deprivation," or the "denial," specified in Article 14.

58 When an ordinance is passed by a city council, under authority of the State, it is an act of the State, and if it deprives one of his property without due process, or denies equal protection, the act will be enjoined, for the Constitution is sacred, and must under all circumstances, be upheld.

But has the State, or the Municipality, in these cases, done any act which violates the Constitution, except in so far as such act has been consented to by the Companies?

It is fundamental that every individual, constitutional right, may be waived.

"A person may, by his acts, or omission to act, waive a right which he may otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection, had not by prior acts, precluded himself from being heard in opposition; thus a person who has participated in proceedings under a Statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality." 12 Corpus Juris, p. 769, Sec. 190, etc. —, and cases cited.

Even in criminal cases, "those constitutional guarantees which are in the nature of personal privileges of the accused, may be waived by him, and therefore he may not question the constitutionality of a statute under which he has made such a waiver." 12 Corpus Jur. 774, Sec. 203.

It must be apparent that if the confiscatory rate is fixed, not by the municipality, but by the utility company, that the State has done no act "depriving" the company of its constitutional rights. It must likewise be apparent, that if the rate is the joint act of the utility company and the city,—if the utility company has consented to the rate, that it has waived the constitutional right which it might otherwise assert, and I am convinced that if a rate is fixed by agreement of the utility company which at the time, is
59 a reasonable rate, but which thereafter becomes confiscatory, without any act of the State, but simply as a result of industrial conditions, that the prohibition of the Fourteenth Amendment upon the State, is not violated by the State.

This is serious business, restraining the sovereign act of a state. There is no constitutional guarantee of compensatory rates. So far as income and profits are concerned, the utility corporation stands—exactly in the same position as the building corporation, or the street improvement company. It may make money—it may lose money, but only when the State has acted affirmatively, to the deprivation of reasonable income upon actual investment, can constitutional guarantee be invoked; and where the utility company consents to the act of the State, there is not that "deprivation" or "denial" which the Constitution forbids.

So that I am satisfied that the utility companies are bound by these contracts.

I realize of course the hardships which this construction imposes. I realize that it is inequitable to expect a utility company to furnish service which cannot be paid for out of the income. It may not be here inappropriate to quote from the opinion in the Columbus Railway case Supra:

"It cannot be denied, on the showing made, that the present war has greatly increased the cost of street railway operation. The award of the National War Labor Board in the wage controversy, cannot be regarded otherwise than binding on the company, and the increase of wages granted by the company pursuant thereto, cannot, in any fair sense, be considered as its voluntary act. It is also undoubtedly true, on the showing made, that complainant cannot, under existing conditions finance any improvements required to meet new demands for heat, light, and power, or for increased street railway facilities, and its failure so to do must injure the interests of the defendant and its inhabitants as much as it injures the complainant.

60 "Prolonged operation under these conditions would seem to be a manifest impossibility, and must result in impairing the street railway service and grievously harming the people and business of the city. These considerations do not, for the reasons already stated, present any ground upon which a court can grant relief, for it has power only to declare the law and apply it. A sound public policy forbids usurpation by the courts of governmental power lodged in other departments of the government. No power inheres in a court, either to make contracts for parties, or to absolve them from the effect of their contracts, provided the parties are competent in law to contract, and no fraud intervenes in the making thereof.

In view of these well recognized limitations of the court's power, I can only suggest that the present emergency, likely as it is to become much graver in the near future, calls urgently for some kind of accom-odation or temporary compromise between the parties."

Much of the controversy in these cases arise out of a misunderstanding between the utility companies and the people of the communities which they serve. There ought not to be any misunderstanding. The public should interest themselves sufficiently to understand definitely the view-point of the company, and it is not too much to hope that in these cases, where existing contracts by virtue of war conditions, imposed grave hardships, that temporary arrangements may be made by which the situation may be solved for the time being.

The Record in These Cases.

These cases have been set down for trial by order of the court, upon the issue as to the validity of the contracts. I am not sure that the record is in shape to present this issue appropriate for review in the higher court. Of course, I have assumed, and counsel have assumed, for the sake of this question, that the contract rates are confiscatory, but I am not sure that the record justifies this assumption.

To save any possible question, in the interest of all parties, it ought to be admitted of record, for the purpose of this hearing, that the contract rates in each individual case, are confiscatory. So im-

portant is this in my present view, that I feel that it would be necessary to take testimony upon this point, unless it is handled
61 by a stipulation.

I therefore suggest, that counsel for the plaintiffs in these cases, prepare a stipulation which they feel will make the record, and submit it to counsel for the Company, and by mutual co-operation, I am satisfied that without waiving anybody else's rights, the record can be completed. In this way the matter can be presented to a higher court without much expense, and with more satisfaction in the consideration of the question involved.

After this is done, the court will enter an order of record, and will at that time hear counsel for the plaintiffs upon their request for a continuance of the restraining order, pending appeal. Application for such continuance to be prepared and served upon counsel, as the rules of this court provide.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed March 24th, 1919. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

62 And thereafter to-wit: On the 24th day of May A. D. 1919 there was filed in said cause an Amended and Substituted Answer which is in words and figures as follows to-wit:

63 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MUNROE, Mayor; J. W. PRICE, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney; R. H. Munro, W. H. Conner and W. R. Baker, Defendants.

Amended and Substituted Answer.

Now comes the defendants above named, and each of them, by their attorneys X. C. Nady and Ralph H. Munro, and for answer to the petition or bill of complaint of the plaintiff, or complainant, state:

Count One.

1. That on or about the 15th day of December, 1916, the City Council of the City of Fairfield, Iowa, did at the instance and request of the following named persons, to-wit: William G. Dows, Isaac B. Smith and John A. Reed, pass an ordinance in words and figures as follows:

64

Ordinance No. 192.

An Ordinance Granting Rights and Franchises to William G. Dows, Isaac P. Smith, and John A. Reed, Their Successors or Assigns, for Furnishing Gas for Light, Heat and Fuel to the City of Fairfield, Iowa, and the Inhabitants Thereof, and for Acquiring, Erecting, and Maintaining a Gas Plant in said City.

Therefore be it ordained by the City Council of the City of Fairfield, Iowa:

Section 1. That William G. Dows, Isaac B. Smith, and John A. Reed, their successors or assigns, hereinafter designated as the grantee or the gas company, be and are hereby vested with the right, franchise and privilege for the term of twenty (20) years from and after the acceptance of this ordinance, to acquire, erect and maintain a gas plant in the city of Fairfield, Iowa, hereinafter designated as The City, for the manufacture and sale of gas for light, heat and fuel, and in connection therewith to use the streets, avenues and alleys of said city, and all streets, avenues and alleys that may hereafter be added thereto, for the purpose of laying down and maintaining in said streets, avenues and alleys pipes for the conveyance of gas in and through said city for the use of its inhabitants and the city and others, provided always that said gas pipes when so laid shall not in any manner interfere with the drainage of said city or the construction of sewer or underground ways for the conveyance of water, or with any other improvement the city may make upon or in said streets, avenues, alleys and public places; and provided further that said gas company shall lay its pipes or mains, and make needed repairs and replacements therein and thereto, on streets which are being repaved or about to be paved in advance of the work of paving or repaving said streets, upon reasonable notice from said city; and provided further that nothing herein shall be construed as giving the said gas company an exclusive franchise or prevent the said city from granting any other company or gas companies franchises over the streets, avenues, alleys or public places of the city.

Section 2. That whenever said gas company proposes to open any streets, avenues or alleys for the purpose of laying down gas mains or pipes, said company shall give the city council, or member thereof having charge thereof, twenty-four (24) hours' notice in writing of its intention so to do, which notice shall be accompanied by a plat, if requested, of the street, avenue or alley, upon which it proposes to lay its mains or pipes, specifying the proposed position its mains or pipe will occupy in said street, avenue or alley, the depth below the surface the same shall be laid, and the kind of material, the number thereof having charge of the same shall then give to said company its permit for so doing, and said company shall not unnecessarily during the progress of its work, obstruct the passage of such street, avenue or alley, and further shall within a reasonable time repair such portions of said street, avenue or alley, as it may have entered

upon in such manner as it may have found it, such work of opening and closing said street, avenue or alley to be done at all times under the supervision of, and subject to, the approval of the city Council, or member thereof, having charge of the same, or other duly constituted officer having charge thereof. All the foregoing provisions shall apply to entry, opening or closing of any street avenue or alley for the purpose of connecting service pipes to the mains or pipes of said company at any time, and said company shall at all times be required to use all necessary means to repair streets or pavements of every kind so as to bring the same to grade and have same to grade at all times.

The gas company shall extend its mains for customers in all cases where bona fide customers apply in writing to be supplied with gas, and agree in their applications to purchase gas from the company for use for light heat or fuel, for a period of not less than two years, but there shall not be less than one customer for each one hundred (100) feet of main required to be laid to serve said said applicants.

Section 3. The gas company in consideration of the rights, privileges and franchises herein granted to it, agrees to and shall furnish the inhabitants of the city, gas for lighting, heating and other purposes.

On bills rendered for monthly consumption, the rates shall be as follows:

For the first 3,000 Cubic feet, $1.375	per	thousand	cubic	feet.
For the next 3,000 Cubic feet, $1.325	"	"	"	"
For the next 6,000 Cubic feet, $1.275	"	"	"	"
For the next 6,000 Cubic feet, $1.20	"	"	"	"
For the next 6,000 Cubic feet, $1.10	"	"	"	"
For the next 6,000 Cubic feet, 1.05	"	"	"	"

For all consumption over 30,000 cubic feet $1.00 per thousand cubic feet, provided, however, the gas company will be allowed to charge a penalty of five cents (5¢) per thousand cubic feet if the consumer fails to pay his bill at the office of the gas company on or before the tenth (10th) day of the month succeeding that for which the bill is rendered. Prepay meters shall be installed on request.

The said gas company is also authorized to charge and collect the sum of twenty-five cents (25¢) for a minimum amount of gas used on each meter installed, and until written notice has been given to the company by the owner of the premises of the customer to remove the meter from the premises.

The rates which grantee is entitled to charge for service from and after three (3) years after the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa.

Section 4. The company shall not be required to install a meter where the applicant therefor is indebted to the company for service previously rendered to him by the company.

Section 5. The gas furnished by the gas company shall be of not less than fourteen (14) candle power, of the equivalent of Standard English Sperm candles when tested on the London Metropolitan

Burner, and not less than five hundred and fifty (550) British Thermal Units per cubic foot, and the monthly average shall not be less than five hundred and sixty-five (565) British Thermal Units per cubic foot, and the gas supplied shall at all times be practically free from sulphuretted hydrogen.

The grantee, if requested by the city shall at its own expense install and maintain in its works or office a calorimeter of standard manufacture or other device of equal efficiency for testing the quality of gas and the authorized agents of the city shall at all reasonable hours have access thereto for the purpose of conducting tests of the gas being furnished by the grantee so as to determine its quality. If the average number of heat units of the gas furnished by the grantee for any month as shown by weekly tests is less than five hundred and sixty-five (565) British Thermal Units per cubic foot, then the bills of all consumers for said month shall be reduced in the direct ratio which said deficiency bears to five hundred sixty-five (565).

The gas company, at its own expense, shall install in the city hall a pressure gauge connected with the gas main in the streets, which will indicate and record the pressure in the street main at all hours of the day. Said gauge to be in charge of a duly appointed official or employee of the city, and be maintained in constant operating condition by said official, or employee, so designated by the city.

The pressure shown by said gauge, in the city hall shall never be less than one and one-half ($1\frac{1}{2}$) inches, nor more than seven (7) inches of water pressure and the daily variation of pressure at said gauge shall never be greater than one hundred per cent (100 per cent) of the minimum pressure.

Section 6. The gas and service furnished by said company shall be further subject to such reasonable regulation and control as may be determined by ordinance of said city during the term of the franchise hereby granted.

Sec. 7. The city reserves the right to, by ordinance, provide the reasonable rules and regulations governing the manner in which the said gas company shall install its mains and connections and make repairs thereto.

Sec. 8. The privileges herein granted in the preceding Sections are made upon the condition that said gas company shall at all times, unavoidable accidents only excepted, hold itself in readiness to furnish, and shall furnish, all gas required by the said city, and the inhabitants thereof, as hereinbefore specified and shall at all times, fully insure, indemnify and save harmless the city of Fairfield, from all causes of action or litigation, or damage of any kind, claims for which may be made against the city, and from all loss or damage of any kind which may be sustained by any person, firm or corporation by reason of the present or future use or occupancy of any street, avenue or alley or by reason of defective, negligent or imperfect closing of all openings made by it in said streets, avenues or alleys, and shall permanently maintain good, complete and substantial gas works, and shall at all times conform with, submit to and carry out any ordinance now in force or that may hereafter be enacted not in-

consistent herewith, for reasonably regulating or controlling the use of the streets, avenues or alleys, by said gas company.

Upon written demand of any consumer any meter shall be tested by the City in such a manner as the City Council may provide by ordinance and in case such meter shall be found to be incorrect to the extent of two per cent (2%) variation, or more, the expense of the testing thereof shall be borne by the grantee, and the account of the consumer for the three months next preceeding the test shall be adjusted upon the basis of the error found on such inspection, but said company shall receive reasonable notice of the time and making of said test. In case such meter shall be found to be correct within two per cent (2 per cent) the inaccuracy shall not be considered an error and the cost of the test shall be borne by the consumer.

Section 9. The grantee shall at the request of the consumer, install by the side of the consumer's meter a printed card upon which the monthly readings of such meter and the date thereof shall be entered by the employee reading the same upon the date that the reading is made, and the meter reading shown upon said card shall be conclusive upon the grantee as to the state of the meter upon the date the same was read.

Section 10. This ordinance permits grantee herein, to purchase the existing gas plant in the City of Fairfield with all its appurtenances, rights and privileges, and as soon after said purchase as practicable grantee shall install necessary apparatus for making and proper purification of gas to ensure to the City and the inhabitants thereof an ample supply of gas of required quality.

Section 11. The grantee shall, and by acceptance of this franchise, agrees to expend within twelve months (12) from date of
67 acceptance of its franchise, at least Ten Thousand Dollars ($10,000) and shall within the following twelve (12) months expend an additional Ten Thousand Dollars ($10,000)—making an expenditure of at least Twenty Thousand Dollars ($20,000) within twenty-four months for the building, improving and extending of its plant and distributing system of its gas properties within the city of Fairfield.

Section 12. This ordinance shall be of full force and effect from and after its passage and adoption by the legal voters of Fairfield, Iowa, at the special election to be held Tuesday, January 30th, 1917, and the Mayor and City Clerk are hereby authorized and directed to do all things required by the Statutes of Iowa, and ordinances of the city for the lawful submission of the question of the passage and adoption of this ordinance to the legal voters of the city of Fairfield, Iowa, at said special election.

Section 13. The grantee herein shall within thirty days after the passage and adoption of this ordinance by the legal voters of the city file with the city clerk its written acceptance of said ordinance.

Passed this 15th day of December 1916.

D. F. SPRATT,
Mayor.
W. R. HEFLIN,
City Clerk.

68 2. That the City Council of the said City of Fairfield, Iowa, did on the 30th day of January, 1917, hold a special election at which said ordinance was set forth in full upon a ballott containing the following interrogatory: "Shall the following ordinance granting a gas franchise to William G. Dows, Isaac B. Smith and John A. Reed, their successors and assigns, be adopted?"

3. That a majority of the legal voters of said city voted at said special election in the affirmative on said question, and on the 3rd day of February, 1917, the said Dows, Smith and Reed, filed their written acceptance of said franchise with the Clerk of said city and the same was entered of record, as follows:

"*Acceptance of Franchise.*

William G. Dows, Isaac B. Smith and John A. Reed, for themselves, their successors and assigns, do hereby accept the ordinance of the City of Fairfield, Iowa, entitled:

An ordinance granting rights and franchises to William G. Dows, Isaac B. Smith and John A. Reed, their successors or assigns, for furnishing gas for light, heat and fuel, to the City of Fairfield, Iowa, and the inhabitants thereof, and for acquiring, erecting and maintaining a gas plant in said city, therefor", and the rights, powers and privileges conferred upon the said grantees therein named.

In witness whereof the said William G. Dows, Isaac B. Smith and John A. Reed, have duly executed these presents on this 31st day of January, A. D. 1917.

WILLIAM G. DOWS.
ISAAC B. SMITH,
By WILLIAM G. DOWS,
His Attorney in Fact.
JOHN A. REED."

4. That the Complainant is the assignee of the said Dows, Smith and Reed, and is operating under and by virtue of the foregoing franchise and acceptance thereof.

69 5. That the City Council of the said City of Fairfield, Iowa, is — now establishing, and has not since the granting of said franchise and its said acceptance, established, or attempted to establish any rate other than as provided and agreed upon in said franchise.

6. That because of the foregoing facts the rates fixed in said franchise for a period of three years from the date of the acceptance

thereof constituted one of the conditions upon which the said franchise was granted, and the acceptance of said franchise by the said Dows, Smith and Reed, made said franchise a valid and binding contract for the rates therein fixed until the expiration of the said three year period, unless sooner changed by the City Council under and by virtue of its power to fix and regulate rates as provided by Statute.

Wherefore defendants ask that complainant's bill be dismissed upon its merits at complainant's costs.

Count Two.

Now come the defendants, and each of them, and for a further answer and defense plead and say that they re-allege each and all of the foregoing facts and statements, and further state that they deny that the rates so fixed in said ordinance are confiscatory, and they deny that said rates so provided do not afford complainant a reasonable return upon the amount of money invested in said project.

Wherefore having fully answered defendants ask that complainant's bill be dismissed at complainant's costs.

X. C. NADY,
RALPH H. MUNRO,
Attorneys for Defendants.

70 STATE OF IOWA,
Jefferson County, ss:

I, Ralph H. Munro, being first duly sworn on my oath say that I am one of the defendants named in the foregoing answer, that I have read the statements therein contained, and that the same are true as I verily believe.

(Sgd.) RALPH H. MUNRO.

Subscribed and sworn to before me by the said Ralph H. Munro this 21st day of May, 1919.

[SEAL.]

EMILY R. LEGGETT,
Notary Public.

71 And thereafter to-wit: On the 14th day of June, A. D. 1919, there was filed in said cause an Order setting cause for hearing which said order is in words and figures as follows to-wit:

72 In the District Court of the United States for the Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Plaintiff,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MUNRO, Mayor; J. W. PRICE, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney; R. H. Monroe, W. H. Conner, W. R. Baker, Defendants.

Order.

And now on June 14, 1919, it is

Ordered that June 25th, 1919, at ten o'clock A. M. at Iowa City, Iowa, be, and the same is hereby fixed as the time for making final record entries in the above cases under finding heretofore made. Also to determine whether injunctions shall stand pending appeal, and any other questions involved.

Copies of this Order will be sent by the Clerk to counsel for all parties.

Witness my hand.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed June 14, 1919. Wm. C. McArthur, Clerk.

73 And thereafter to-wit. On the 25th day of June A. D. 1919 there was filed in said cause Memerandum which is in words and figures as follows to-wit:

74 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Plaintiff,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Memorandum and Decree.

This, and other cases have been under consideration for some time, with a view, upon suggestion of the Court, that the question as to the sufficiency of the defense pleaded that even if the rates are confiscatory, the plaintiff is entitled to no relief because such rates were fixed by contract between the parties, could be determined without

the delay and expense involved in taking testimony upon the question as to whether the rates were in fact confiscatory.

The Court has heretofore, in Memorandum Opinion, expressed the view that where the rate for a public utility is fixed by contract between the City and the Utility Company, the same is binding, regardless of whether it is confiscatory, or whether it pays a fair profit upon the investment or not. The conclusion there expressed, is still adhered to—the Court being satisfied that such a contract is binding, and that the rate having been fixed by agreement of the Utility Company, such Company should be held to have waived any constitutional guarantee against deprivation of its property without compensation or due process of law.

75 The parties to these cases are now before the Court under order heretofore made, and upon answers in each of the cases, in which, in a separate count, a contract rate is pleaded as a defense, and no issue is made *is* such separate count of the answer, upon the allegation of the plaintiff's petition that the rates are confiscatory.

Counsel for plaintiff and for defendants have already expressed their views that the Court is without power to set the case for hearing upon this issue, and counsel for plaintiff made a specific request that the case be set for hearing upon all the issues presented by the answer. I can conceive of no reason why the Court, satisfied that the facts pleaded in the first Count of the answer, constitute a good defense, and that under such facts the complainant is not entitled to recover, should take the time, or permit the delay and expense incident to a full hearing of the case.

Present Equity Rules contemplate that cases shall be heard as speedily as possible, and Rule 29, in my judgment, permits the Court to set for hearing, this separate issue which goes to the entire cause of action alleged in the plaintiff's petition.

Doubt has been expressed, as to whether, in case the Court should hold the defense to be sufficient and this holding should be reversed upon appeal, the parties would be entitled to a trial upon the other issues presented by the answer. It is my understanding that in case the court should hold the defense sufficient, and the same should be reversed, that the Court of Appeals will remand it to this Court for further proceedings, which will leave the case open to be fully heard upon any issue then presented.

In view of these considerations, the court enters the following Decree:

(Endorsed:) Filed June 25, 1919. Wm. C. McArthur, Clerk. By Gertrude Darrell, Deputy.

76 And thereafter to wit: On the same day, June 25th, 1919, there was filed in said cause a Decree which is in words and figures as follows to wit:

77 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Plaintiff,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Decree.

And now on this 25th day of June, 1919, in the above entitled case, the parties appearing by counsel, and the pleadings herein being presented and duly considered, it is ordered and adjudged, that this case be set down for hearing upon Count One of the Answer—the issue presented by said Count of said Answer to be first tried and determined before proceeding with any of the other defenses herein.

To this order setting the case for trial upon said separate issue, the plaintiff and defendants except. The plaintiff requests the court to try the entire case—to appoint a Master and proceed to the determination of all the issues in the case. The request is denied, and the plaintiff excepts.

And now on this 25th day of June, 1919, this case coming on for hearing upon the issue raised by the First Count of the answer, under the foregoing order, the Court proceeds to the trial thereof, and the evidence being introduced upon such issue, and the court being now fully advised, finds:

That the rates complained of by the plaintiff, were in fact fixed by contract of the parties, as alleged in said Count of said
78 answer, and that said rates are valid and binding upon the plaintiff, regardless of the claim in the plaintiff's petition that the same are confiscatory, and that in view of such contract rates, the facts stated in the Bill of Complaint and amendments thereto, entitle the plaintiff to no relief; such rates being fixed by contract binding upon the plaintiff, and that for this reason the plaintiff is not entitled to any relief herein, and its Bill of Complaint is dismissed. The plaintiff excepts.

The plaintiff makes oral request that the temporary injunction heretofore granted, be continued, or that additional order of injunction be issued to be effective pending the appeal in this case, and is given leave to file written application in support of such request, and the temporary injunction and bond are continued until further orders herein. The Court reserving jurisdiction and power to make such further orders, and reserving full power upon final hearing, to make such orders as may be necessary to carry out any order of distribution of funds if the same becomes necessary under ruling of the Appellate Court.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed June 25th, 1919. Wm. C. McArthur, Clerk, By Gertrude Darrell, Deputy.

79 And thereafter to wit: On the 15th day of August 19*th* there was filed in said cause an Application to Continue Restraining Order which is in words and figures as follows, to wit:

80 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012. Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Application to Court to Continue Restraining Order.

To the Hon. Martin J. Wade, District Judge:

The above named complainant having now filed *his* petition for appeal from the decree of this Honorable Court rendered and entered in the above entitled cause upon the 25th day of June, 1919, does hereby make its request that the injunction now pending against the defendants restraining them from taking action, civil or criminal or interfering with the collection by plaintiff of certain rates for gas sold by *him* within the City of Fairfield, Iowa, under certain terms and conditions named in the order allowing the said writ of injunction be continued in full force and effect pending the determination of the appeal herein.

In support of this application the plaintiff again presents to the court that all of the reasons advanced in support of its application for a temporary injunction herein and considered by the court as warranting the issuance of said temporary injunction apply

81 with full force and effect to this application.

Complainant further suggests to the court that all funds collected by complainant in excess of the ordinance rates since the granting of the temporary writ have been deposited in a bank in the city of Fairfield named by this court as a fund in court subject to such action as might be deemed proper by *y*his court at the final determination of this litigation. This arrangement having proven satisfactory to the parties to this litigation your honor is requested to continue it in full force and effect providing the restraining order is granted pending the appeal herein.

(Sgd.) WM. SMYTH,
(Sgd.) WM. CHAMBERLAIN,
(Sgd.) JOHN A. REED,
Solicitors for Complainant.

82 STATE OF IOWA,
——— *County, ss:*

I, John A. Reed, being first duly sworn do upon my oath depose and say that I am the Vice President of the Iowa Electric Company; that I have read the foregoing application for an increase in rates and that the allegations therein contained are true as I verily believe.

(Sgd.) JOHN A. REED.

Subscribed and sworn to before me by the said John A. Reed, this 12th day of July, 1919.

(Sgd.) WILLIAM SMYTH.
Notary Public, Linn County, Iowa.

(Endorsed:) Filed August 15, 1919. Wm. C. McArthur, Clerk.

83 And thereafter to-wit: On the 15th day of August there was filed in said cause a Petition for Appeal which is in words and figures as follows to-wit:

84 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012. Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Petition for Appeal.

To the Hon. Martin J. Wade, District Judge:

The above named Iowa Electric Company feeling aggrieved by the decree rendered and entered in the above entitled cause upon the 25th day of June, A. D., 1919, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith and prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States sitting at the Capital City of Washington, D. C. under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of *him* be made.

IOWA ELECTRIC COMPANY,
By JOHN A. REED,
WM. CHAMBERLAIN,
WM. SMYTH,
Attorneys for Complainant.

(Endorsed:) Filed August 15, 1919. Wm. C. McArthur, Clerk.

85 And thereafter to-wit: On the same day August 15th 1919 there was filed in said cause an Assignment of Errors which is in words and figures as follows to-wit:

86 In the United States District Court, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Assignment of Errors.

Now at the time of filing his petition for appeal in the above entitled action the complainant files the following assignment of errors and says that the decree entered in the above cause on the 25th day of June, 1919, is erroneous and unjust to the complainant:

First. Because the court declined and refused to hear the evidence in the case upon both counts of the bill of complaint and assigned the case for trial upon one count thereof, thus rendering it impossible for complainant to present its evidence as to the merits of the entire controversy and have the same incorporated as a part of the record in this case and upon this appeal.

Second. Because the court erred in holding that the maximum rate as set forth in the ordinance granting complainant's franchise was and is a rate established by contract between the complainant and the defendant city for the reason that the said rate provisions contained in said ordinance were and are legislative acts of the city of Fairfield passed and adopted pursuant to the authority granted to said city under the statutes of the State of Iowa and particularly under Section 725 of the Code of 1897 as amended.

87 Third. Because the court erred in holding that the complainant company was bound as by contract to render service within the defendant city at the maximum rate fixed in said ordinance granting complainant its franchise for the reason that the defendant city of Fairfield had no authority whatever under the

Statutes of Iowa to regulate complainant's rates of charge by contract but on the contrary had full and complete power and still has full and complete power to regulate said rates by legislative action and the provisions of said ordinance fixing the rates of charge of the complainant company are and should be held to be legislative enactments governing rates passed and adopted pursuant to the power of the defendant city to so regulate rates.

Fourth. Because the court erred in declining and refusing to hold that the provisions contained in the ordinance granting complainant its franchise were legislative provisions enacted pursuant to the statutes of the State of Iowa and as such subject to attack under the Constitution of the United States, provided the rates therein named were confiscatory in character.

Fifth. The Court erred in the final decree in refusing to allow the complainant to proceed to trial and introduce evidence upon the whole case or to appoint a Master to proceed to hear and try the whole case upon all of the issues made by the entire pleadings, thereby depriving complainant of its legal right to a trial on the question of the reasonableness of the ordinance rates and the unconstitutionality of said ordinance by reason of the unreasonableness of the rates therein named and deprived complainant of a judicial determination as to the reasonableness of said rates.

Sixth. The Court erred in its final decree in holding that
88 the Ordinance in controversy and the acceptance thereof by complainant constituted a contract as to rates for three years, notwithstanding that said ordinance by its terms undertook to fix rates for the term of three years, contrary to and in violation of the Statutes of the State of Iowa and particularly of Section 725 of the Code of 1897 and amendments thereof.

Seventh. The Court erred in its final decree in holding that the maximum rates fixed for a period of three years in the ordinance which contained complainant's franchise were binding for the full period of three years even if during said period of three years said rates became confiscatory for the reason that the only power which cities possess is that conferred by Section 725 of the Code of Iowa and amendments thereof, which is a continuing power which can only be exercised by and through legislative enactment of the council, not by agreement.

(Sgd.) WM. CHAMBERLAIN,
(Sgd.) JOHN A. REED,
(Sgd.) WM. SMYTH,
Solicitors for Complainant.

(Endorsed:) Filed August 15, 1919. Wm. C. McArthur, Clerk.

89 And thereafter to-wit: On the 15th day of August A. D. 1919 there was filed in said cause an Order continuing the restraining order which is in words and figures as follows to-wit:

90 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Order.

And now on this 15th day of August, 1919, the application by the plaintiff for an order of supersedeas, continuing injunction pending appeal, having been filed, presented and submitted; and the court being now fully advised finds that such application should be, and the same is now granted, and the order restraining the defendants heretofore entered and still in force herein shall be and the same is hereby continued in full force pending appeal, and until case is finally disposed of, upon the following conditions:

(1) That the order, and all the conditions of the order heretofore made providing that all funds collected in excess of the ordinance rate be deposited in the bank, shall be and remain in full force until the case is finally disposed of.

(2) That such funds shall be deposited as in such prior order required.

(3) This court and the court to which appeal is taken shall have full power to revoke, change or modify this order at any time upon proper showing made.

(4) The plaintiff shall prosecute appeal with diligence, and this court or the court to which appeal is taken may revoke this
91 order in case of unwarranted delay.

To this order defendants except.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed August 15, 1919. Wm. C. McArthur, Clerk.

92 And thereafter to-wit: On the 18th day of August, A. D. 1919, there was filed in said cause an Order allowing Appeal which is in words and figures as follows to-wit:

93 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Order Allowing Appeal.

It is hereby ordered that the appeal of the plaintiff be, and the same is hereby granted upon filing an appeal bond to be approved by the clerk of this court in the sum of Five Hundred ($500.00) Dollars.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed August 18, 1919. Wm. C. McArthur, Clerk.

94 And thereafter to-wit: On the 29th day of September, A. D. 1919, there was filed in said cause a Bond on Appeal which is in words and figures as follows to-wit:

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MONROE, Mayor; J. W. PRICE, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, Defendants.

Bond on Appeal.

Approved and Filed September 29, 1919. Wm. C. McArthur, Clerk.

Know All Men by These Presents, That we, The Iowa Electric Company, a corporation, as principal, and John A. Reed and William G. Dows, as sureties, are held and firmly bound unto City of Fairfield, Iowa, R. H. Monroe, Mayor; J. W. Price, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen; and X. C. Nady, as City Attorney; in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said above named defendants City of Fairfield, Iowa, R. H. Monroe, Mayor, J. W. Price, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen; and X. C. Nady, as City Attorney; certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

95 Sealed with our seals and dated this 23rd day of September, in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a term of the District Court of the United States for the Southern District of Iowa in a suit depending in said Court between Iowa Electric Company, Complainant, and City of Fairfield, Iowa; R. H. Monroe, Mayor, J. W. Price, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen; and X. C. Nady, as City Attorney, defendants, a decree was rendered against the said Iowa Electric Company, and the said Iowa Electric Company, Complainant having obtained an appeal to the Supreme Court of the United States to reverse the judgment in the aforesaid suit.

Now, the Condition of the Above Obligation is Such, That if the said Iowa Electric Company, Complainant shall prosecute its appeal to effect, and will answer all damages and costs, if it fail to make its plea good, then above obligation to be void; else to remain in full force and virtue.

IOWA ELECTRIC COMPANY. [SEAL.]
By JOHN A. REED,
Vice President.
JOHN A. REED. [SEAL.]
WILLIAM G. DOWS. [SEAL.]

Sealed and delivered in presence of:
J. B. HILL.
CARL B. MYERS.
WM. SMYTH.

Approved by:
MARTIN J. WADE,
Judge.

96 & 97 And thereafter to-wit: On the 16th day of October, A. D. 1919, there was filed in said cause a Praecipe for Transcript which is in words and figures as follows to-wit:

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Praecipe for Transcript of the Record on Appeal.

Hon. Wm. C. McArthur,
Clerk of the United States District Court,
Southern District of Iowa.

Appellant requests that you incorporate into the transcript of the record upon this appeal:

First. The bill of complaint and all amendments thereto.

Second. Process or subpoena with the return of the Marshal endorsed thereon.

Third. The answer of the defendants and all amendments thereto or substitutions therefor.

Fourth. All proceedings and orders in the case.

Fifth. The opinion and decree of the court.

Sixth. The petition for appeal and order thereupon.

Seventh. The assignment of errors.

Eighth. Bond on appeal.

Ninth. The citation on appeal.

98 Tenth. Clerk's certificate.

WM. CHAMBERLAIN,
JOHN A. REED,
Solicitors for Appellant.

Service of the above Praecipe for Transcript of the Record on appeal accepted this 15th day of October, 1919.

X. C. NADY AND
RALPH H. MUNRO,
Solicitors for Appellee.

(Endorsed:) Filed Oct. 16, 1919. Wm. C. McArthur, Clerk. By Louis J. Adelman, Deputy.

99 UNITED STATES OF AMERICA,
Southern District of Iowa, ss

I, Wm. C. McArthur, Clerk of the District Court of the United States for the Southern District of Iowa, hereby certify the foregoing 98 pages to contain a full, true and complete transcript of the record of the case of Iowa Electric Company vs. City of Fairfield Iowa, et al., No. 4012-Equity Ottumwa Division, as called for by the praecipe for transcript filed in said cause October 16th, 1919; as full true and complete as the originals thereof on file and of record in office in the City of Ottumwa in said district.

I further certify that I transmit herewith as part of said record the original Citation with return of service thereof on Defendants.

In witness whereof I hereunto set my hand and affix the seal of said Court at office in the City of Ottumwa in said District this 17th day of October A. D. 1919.

[Seal U. S. District Court, Southern District of Iowa.]

WM. C. McARTHUR,
Clerk of said Court.

Endorsed on cover: File No. 27,332. S. Iowa D. C. U. S. Term No. 577. Iowa Electric Company, appellant, vs. City of Fairfield, Iowa, et al. Filed October 20th, 1919. File No. 27,332.

TOPICAL INDEX

Statement of Case 1-10
Rate making powers municipalities 10-14, 30-42
Iowa statutes governing such powers...14-22, 45-53
Grant express power eliminates power
by implication 22, 42-45
Construction of Statutes 53-56
Construction Iowa Statute by Iowa Court..23, 56-63
Iowa rule of construction binds this court..24, 63-66
Iowa rule identical with Federal rule 25, 66-72
Iowa Statute confers governmental powers
on municipalities .....25-28, 72-82.
Acceptance franchise not contract 28-29, 82-88, 92-96
Mutuality of Contract 89
Limitations in Iowa Statutes 90-91

LIST OF CASES REFERRED TO

Akron vs. McElligot, 147 N.W. 773 .....10, 30
Bassick vs. Etna Ex. Co., 246 Fed. 974 95
Brunnit vs. Ogden W. W. Co., 33 Utah 303,
93 Pac. 828 .....11, 13
Blair vs. Chicago, 200 U.S. 400, 50 L. Ed. 801....11
Becker vs. Keokuk W. W. Co., 79 Iowa
419-22 .....12, 34
Bank vs. Converse, 200 U.S. 426, 50 L. Ed. 53[illegible]...95
City of Detroit vs. Osborne, 135 U.S. 492
34 L. Ed. 260 65
City of Cleveland vs. Cleveland St. Ry. Co.,
194 U.S. 517, 48 L. Ed. 1102 11
City of Keokuk vs. Scroogs, 39 Ia. 447 .....14, 43
Cedar Rapids W. Co. vs. City, 118 Iowa
234, ...12, 21, 91, 92, 96
City of Tipton vs. Tipton L. & H. Co., 176
Iowa at 230 .....75, 90
Corpus Juris, 13-331 28

Raymond vs. Parish of Terrebonne, 28 Fed. 773 ..... 24, 63
Ruthland Marble Co. vs. Ripley, 10 Wall 339, 19 L. Ed. 955 ..... 29, 86
Selkirk vs. Gas Co., 176 N.W. 301 ... 23, 26, 52, 62, 79
San Antonio Ry. Co. vs. City, 257 Fed. 467 .... 25, 26
State of Iowa vs. Chariton Tel. Co., 273 Ia. 497 ..... 29, 92
State ex rel. Traction Co. vs. Pub. Ser. Com., 162 N. Y. S. 405 22
Town of Williams vs. Iowa Falls Elec. Co., 170 N.W. 815 .... 12, 13, 23, 26, 28, 35, 78, 83, 91, 93
Town of Woodward vs. Ia. Ry. & Lt. Co., 178 N.W. 549 ..... 14, 23, 56, 81, 91
Tweedie Trading Co. vs. Parlin & Orendorff Co., 204 Fed. 50 ..... 29, 89
U .S. vs. Jackson, 143 Fed. 787 ..... 11, 14, 43
Usher vs. Livermore, 2 Cole (Ia) 117 ..... 28, 83
Velie Motor Car Co. vs. Koppmeier, 194 Fed. 324 29
Vincennies Bridge Co. vs. Bd. of Commissioners, 248 Fed. 93 64
Walla Walla vs. Water Co., 173 U.S. 1, 43 L. Ed. 341 ..... 14, 34
West Penn Churn Co. vs. Prentice, 236 Fed. 895 95

Supreme Court of the United States

October Term, 1920

No. 189

IOWA ELECTRIC COMPANY,
Appellant,
vs.
CITY OF FAIRFIELD, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

APPELLANT'S BRIEF AND ARGUMENT

John A. Reed, William Chamberlain and Ralph Maclean,
Attorneys for Plaintiffs, Appellant.
X. C. Nady and Ralph Munro,
Attorneys for Defendants, Appellees.

STATEMENT OF FACT

There is but on issue shown by the record as follows:

Has a city council authority under the statutes of Iowa, hereinafter referred to, (which are the only

statutes pertaining to the subject of gas franchises or rates) the right to enter into a contract with a public utility Company, furnishing gas service, fixing rates to be charged for said gas service by said company for a definite period of time, and which rates the company is bound to observe, even if confiscatory; said statutes being Sec. 720 and 725 of the 1913 Supplement of the Code of Iowa appearing on Pages 20, 21 and 22 hereof.

The facts as disclosed by the records are as follows:

The Defendant-Appellee City is a municipal corporation, organized and existing under the laws of the State of Iowa. The Plaintiff-Appellant Company is a corporation organized under the laws of the State of Iowa, carrying on the business of furnishing gas to the said city and its inhabitants under a twenty year franchise, authorizing it so to do, granted to Plaintiff's assignors by Ordinance Number 192 of said city, passed and approved at a special election January 30, 1917, (Record P. 16-20 inc.) and said ordinance was duly accepted by Plaintiff's assignors. (Record P. 41.)

All of the provisions of said franchise referring to the subject of rates in any manner is contained in Section 3 thereof. (Record p. 17-18) which is as follows:

Section 3.

"The gas company in consideration of the rights, privileges and franchises herein granted

to it, agrees to and shall furnish the inhabitants of the city, gas for lighting, heating and other purposes.

'On the bills rendered for monthly consumption, the rates shall be as follows:

'For the first 3,000 cubic feet, $1.375 per thousand cubic feet; for the next 3,000 cubic feet, $1.325 per thousand cubic feet; for the next 6,000 cubic feet, $1.275 per thousand cubic feet; for the next 6,000 cubic feet $1.20 per thousand cubic feet; for the next 6,000 cubic feet, $1.10 per thousand cubic feet; for the next 6,000 cubic feet, $1.05 per thousand cubic feet;

'For all consumption over 30,000 cubic feet $1.00 per thousand cubic feet, provided, however, the gas company will be allowed to charge a penalty of five cents (5c) per thousand cubic feet if the consumer fails to pay his bill at the office of the gas company on or before the tenth (10th) day of the month succeeding that for which the bill is rendered. Prepay meters shall be installed on request.

'The said gas company is also authorized to charge and collect the sum of twenty-five (25c) for a minimum amount of gas used on each meter installed, and until written notice has been given to the company by the owner of the premises of the customer to remove the meter from the premises.

'The rates which grantee is entitled to charge for service from and after three (3) years after

the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa."

That the plaintiff charged for gas service furnished by it at and in the city of Fairfield in accordance with the rates provided in said Section 3, from the date it commenced to furnish said service, to-wit, about March 1, 1917, up to the 30th day of April, 1918, (Record p. 6) and placed its plant in good operating condition and operated it carefully and economically during said time. (Record p. 6). The rates charged did not and would not produce sufficient revenue to pay operating expenses, taxes, and depreciation, and leave any sum whatever for a return to plaintiff upon the fair and reasonable value of its property used in furnishing said service. Upon ascertaining said facts, plaintiff presented to the council of the said defendant city and its individual members statements of the earnings and operation of its gas plant for the months of January, February, March and April, 1918, showing said facts, and petitioned said council to take such action as would authorize it to charge higher rates for said gas service and which rates would furnish a gross revenue sufficient to pay operating expenses, taxes, depreciation and a fair return of net profit upon the fair value of its property used in furnishing said service—that is, a reasonable rate—but the council did not grant said application. That thereafter on or about May 1, 1918, plaintiff forwarded to each

of its gas customers a notice, advising them that said rates were not remunerative and were confiscatory; of the causes therefor; and that the Company would bill all gas service furnished after May 1st, at $1.60 per thousand cubic feet. Thereupon the city council of the defendant city at its regular meeting held May 16, 1918, determined to start proceedings against the plaintiff to restrain it from raising the gas rates from $1.375 to $1.60 per thousand cubic feet. (Record p. 8) Plaintiff then brought this action to restrain and enjoin the defendant city, the mayor and the members of the city council, as officers of said city and as representative citizens and tax payers of said city and customers of the plaintiff, from attempting to enforce the rate provisions of Section 3 of said Ordinance No. 192, alleging that the enforcement of the ordinance rate would be a confiscation of its property in violation of Section 1 of the Fourteenth Amendment and of the Fifth Amendment of the Constitution of the United States and of Sections 9 and 18 of Article One of the Constitution of the State of Iowa, and that the amount in controversy greatly exceeded the sum of Three Thousand dollars, and praying that pending the trial of the said cause on its merits, and the entering of judgment and decree, that a temporary injunction issue, granting the aforesaid relief, which application for temporary injunction was duly allowed on terms and issued as prayed. On the 24th day of May, 1919, the defendant filed an amended and substituted answer, in two counts.

In Count 1, they alleged the passage and adoption of Ordinance No. 192, its acceptance by plaintiff's grantors, and assignment to plaintiff. (Record p. 41), and further:

> "That the City Council of the said City of Fairfield, Iowa, is .... now establishing, and has not since the granting of the said franchise and its acceptance, established, or attempted to establish, any rate other than as provided and agreed upon in said franchise."
>
> "That because of the foregoing facts, the rates fixed in said franchise for a period of three years from the date of acceptance thereof constituted one of the conditions upon which the said franchise was granted, and the acceptance of said franchise by the said Dows, Smith and Reed, made said franchise a valid and binding contract for the rates fixed therein until the expiration of the said three year period, unless sooner changed by the city council under and by virtue of its powers to fix and regulate rates as provided by law."

Count 2 is a denial that the rates fixed by Ordinance No. 192 are confiscatory, and that they do not afford to plaintiff a "reasonable return upon the amount of money invested in said project." (Record p. 43).

Afterwards the said case, by order of court, was duly set down for hearing and argument upon the

question as to the sufficiency of the defense pleaded in the first count of the answer, that even if the rates were confiscatory, the plaintiff was not entitled to any relief, because the rates were fixed by the franchise ordinance, which had been accepted by plaintiff's grantors, thus contituting a contract between the city and complainant, fixing its rates to be charged for gas in Fairfield for three years after the acceptance of the franchise.

After argument by counsel on the 25th day of June, 1919, the court filed in said cause a memorandum and decree (Record p. 43, 44 and 45) holding:

> "That the rates complained of by the plaintiff were in fact fixed by contract of the parties as alleged in said Count of said Answer, and that said rates are valid and binding upon the plaintiff, regardless of the claim in plaintiff's petition that the same are confiscatory, and that in view of such contract rates, the facts stated in the bill of complaint and amendments thereto, entitle the plaintiff to no relief; such rates being fixed by contract binding upon the plaintiff, and that for this reason the plaintiff is not entitled to any relief herein, and its bill of complaint is dismissed. The plaintiff excepts."

Afterwards on the 15th day of August, 1919, the plaintiff filed its petition for appeal (Record p. 47 and 48) and on the same date filed its

ASSIGNMENT OF ERRORS

On which it now relies as follows, (Record 48-9):

"Second. Because the court erred in holding that the maximum rate as set forth in the ordinance granting complainant's franchise was and is a rate established by contract between the complainant and the defendant city for the reason that the said rate provisions contained in said ordinance were and are legislative acts of the city of Fairfield passed and adopted pursuant to the authority granted to said city under the statutes of the State of Iowa and particularly under Section 725 of the Code of 1897 as amended.

"Third. Because the court erred in holding that the complainant company was bound as by by contract to render service within the defendant city at the maximum rate fixed in said ordinance granting complainant its franchise for the reason that the defendant city of Fairfield had no authority whatever under the Statutes of Iowa to regulate complainant's rate of charge by contract but on the contrary had full and complete power and still has full and complete power to regulate said rates by legislative action and the provisions of said ordinance fixing the rates of charge of the complainant company are and should be held to be legislative enactments governing rates passed and

adopted pursuant to the power of the defendant city to so regular rates.

"Fourth. Because the court erred in declining and refusing to hold that the provisions contained in the ordinance granting complainant its fraichise were legislative provisions enacted pursuant to the statutes of the State of Iowa and as such subject to attack under the Constitution of the United States, provided the rates therein named were confiscatory in character.

"Sixth. The Court erred in its final decree in holding that the ordinance in controversy and the acceptance thereof by complainant constituted a contract as to rates for three years, notwithstanding that said ordinance by its terms undertook to fix rates for the terms of three years, contrary to and in violation of the Statutes of the State of Iowa and particularly of Section 725 of the Code of 1897 and amendments thereof.

"Seventh. The Court erred in its final decree in holding that the maximum rates fixed for a period of three years in the ordinance which contained complainant's franchise were binding for the full period of three years even if during said period of three years said rates became confiscatory for the reason that the only power which cities possess is that conferred by Section 725 of the Code of Iowa and amendments thereof, which is a continuing power which can only

be exercised by and through legislative enactment of the council, not by agreements."

On the 15th day of August, 1919, the court made an order allowing said appeal. (Record p. 51) On the 29th day of September, 1919, the plaintiff duly filed its bond on appeal in compliance with said order allowing said appeal, (Record p. 50-52) and having complied with the provisions of the law governing the taking of appeals, duly perfected its appeal to the supreme court of the United States.

DIVISION ONE

IN THE ABSENCE OF EXPRESS STATUTORY AUTHORITY A MUNICIPALITY HAS NO AUTHORITY OR POWER TO CONTRACT WITH A PUBLIC UTILITY CORPORATION FIXING RATES TO BE CHARGED THE PUBLIC FOR SERVICE.

(a) The power of municipalities to contract must be conferred in express terms by act of the legislature or indispensible to the exercise of a power expressly conferred by act of the legislature.

Heins vs. Lincoln, 102 Ia. on p. 77.
Town of Akron vs. McElligott 147 NW 733 on p. 774.
Ottumwa Railway & Light Co. vs. City of Ottumwa, (Iowa) 178 NW 905.

Mitchell vs. Dakota Central Telephone Co., 246 U. S. 396 (at 412) 62 L. Ed. 793.
Knoxville Gas Co. vs. City 261 Fed. 283.
Knoxville Water Company vs. Knoxville, 200 U. S. 22.
Blair vs. Chicago, 200 U. S. 34.
Home Telephone Company vs. Los Angeles 211 U. S. 265, 273, 274.
Pioneer Telephone & Telegraph Co. vs. State, 127 Pac. 1073 on p. 1076.
City of Minneapolis vs. Minneapolis Street Ry. Co., 215 U. S. 417-54 L. Ed. 259.
Detroit vs. Citizens Street Railway Company, 184 U .S. 368 46 L. Ed. 592.
City of Cleveland vs. Cleveland St. Ry. Co., 194 U. S. 517, 48 L. Ed. 1102.
Rogers Park Water Co. vs. Fergus 178 Ill., 578 53 N. E. 363.
Rogers Park Water Company vs. Fergus, 180 U. S. 624, 45 L. Ed. 702.
Omaha Water Company vs. City, 147 Fed. 1.
Brummitt vs. Odgen Water Works Co., 33 Utah 303-93 Pac. 828.
Rosecrans vs. U .S., 165 U. S. 263.
U. S. vs. Jackson, 143 Fed. 787 on 188.

(b) No power to fix or contract for rates can be implied.

Louisville Natural Gas Co. vs. State, 134 Ind. 49, 34 N. E. 702.

Becker vs. Keokuk Water Works, 79 Ia. 419-422.
Cedar Rapids Water Co. vs. Cedar Rapids, 118 Ia. 234 on p. 255.
Mills vs. Chicago, 127 Fed. 731.
Town of Williams vs. Iowa Falls Electric Co., 170 N. W. 815 on p. 816.

(c) All doubtful expressions of the grant are to be resolved against the power to contract.

Ottumwa Ry. & Light Co. vs. Ottumwa, decided August 9, (Iowa), 178 N.W. p. 905.
Knoxville Gas. Co. vs. City, 261 Fed. 283.

(d) "The surrender by contract, of a power of government, though in certain well defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature has the authority to make such a surrender, unless the authority is clearly delegated to the municipality by the supreme legislature. The general powers of a municipality or of any other political sub-division of the state are not sufficient. Specific authority for that purpose is required."

Home Telephone & Telegraph Co. vs. City of Los Angeles, 211 U. S. 265, 53 L. Ed. 176. Decided Nov. 30, 1908.

Town of Williams vs. Iowa Falls Electric Co., 170 N. W. 815, 816.

Rogers Park Water Co. vs. Fergus, 178 Ill. 578, 53 N. E. 363.

Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 630, 45 L. Ed. 702, 706.

Milwaukee Elec. Ry. Co. vs. Railroad Commission, 238 U. S. 174, 59 L. Ed. 1254, 1260, first column.

Freeport Water Co. vs. Freeport, 180 U. S. 587, 599, 611, 45 L. Ed. 679, 688, 693.

Marquis vs. Polk County Telephone Co., 100 Neb. 140, 158 N. W. 927.

Brummit vs. Ogden Water Works Co., 33 Utah 302, 93 Pac. 828, 834.

City of Zanesville vs. Zanesville Light Co. 47 O .St. 1, 23 N. E. 55, 59.

Portland Ry. L. & P. Co. vs. Portland, 201 Fed. 119, 125, 126.

Puget Sound Traction L. &. P. Co. vs. Reynolds, 223 Fed. 371, 375.

DIVISION TWO

SECTION 725 OF THE CODE CONFERS EXPRESS POWERS ON MUNICIPALITIES OVER GAS RATES AND THEREBY ELIMINATES THE SUBJECT FROM THE IMPLIED POWERS OF GENERAL STATUTES.

Rosecrans vs. U. S., 165 U. S. 257 on p. 262.

United States vs. Jackson, 143 Fed. on p. 787-788.

City of Keokuk vs. Scroggs, 39 Ia. 447.
McBride vs. Railway Company, 134 Iowa 405.
Jackson vs. C. R. I. & P. Ry. Co., 178 Fed. 432 on p. 434.
Jackson vs. Cravens, 238 Fed. on p. 119.
Walla Walla vs. Walla Walla Water Co., 173 U. S. p. 1-43 L. Ed. 34.

DIVISION THREE

THE ONLY IOWA STATUTES RELATING TO THE CONFERRING OF POWER UPON MUNICIPALITIES TO GRANT GAS FRANCHISES TO PRIVATE PERSONS OR CORPORATIOS AND THE REGULATING OF RATES FOR GAS SERVICE FURNISHED BY AUTHORITY OF SUCH FRANCHISES, ARE SECTIONS 720 AND 721 OF THE 1913 SUPPLEMENT TO THE CODE, WHICH AUTHORIZE THE GRANTING OF SUCH FRANCHISES AND REQUIRE THAT THEY BE APPROVED BY A MAJORITY VOTE OF THE LEGAL VOTERS AND SECTION 725 WHICH CONFERS POWER UPON CITY COUNCILS TO REGULATE AND FIX GAS RATES, BUT DOES NOT REQUIRE THAT SUCH REGULATION OR FIXING BE SUBMITTED TO THE LEGAL VOTERS FOR APPROVAL. THE LEGISLATIVE HISTORY OF THESE SECTIONS DISCLOSES INTENT TO WITHDRAW AND DENY ANY POWER TO CONTRACT.

So held in Town of Woodward vs. Ia. Ry. & L. Co., 178 N.W. 549 on p. 550.

Sections 720 and 725 originated in Section 471 of the Code of 1873 of the laws of Iowa, which em-

powered municipal corporations to grant franchises to individuals or corporations to erect water works, said section being as follows:

> "Sec. 471. They shall have the power to erect water works, or to authorize the erection of the same; but no such works shall be erected or authorized until a majority of the voters of the city or town at a general or special election, or four-fifths of the members of the council or board of trustees thereof, by vote, approve the same."

and Section 473, which authorizes the city or town to contract with the franchise holder as to the rates for water service rendered the town for municipal purposes, and also as to the rates to be charged to private consumers, said statute being as follows, to-wit:

> "Sec. 474. When the right to build and operate such works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years and to authorize such individual or company to charge and collect from each person supplied by them with water, such water rent as may be agreed upon between said person or corporation so building said works, and empowered to enter into a contract with the individual or company constructing said works, to supply said city or

town with water for fire purposes and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

Chapter XI of the Acts of the 22nd General Assembly, effective April 12, 1888, made the provisions of Section 471 apply to gas and electric light plants, said act so far as is necessary for the decision of this case being as follows:

"Section 1. That Section 471 and 473 of the Code of 1873, be and the same is hereby amended by inserting in the first line thereof after the word "works" the following words, "or to establish and maintain gas works or electric light plants, with all necessary poles, wires, burners and other requisits of said gas works or electric light plants."

"Section 2. That Section 473 of the Code of 1873 shall be held to apply to the establishment and maintenance of gas works and electric light plants as fully as they do to the erection of water works."

Afterwards the same legislature passed Chapter 16, effective July 4th, 1888, three months and twenty-two days after Chapter 11 took effect, which conferred power upon cities of the first and second class, having over seven thousand inhabitants, and

special charter cities to regulate gas rates, but declaring that the statute should not be construed as to authorize the abridgment of the power to regulate upon the making of any contract, and conferred said power and provided the limitation in the following language:

> "That all cities of the first class and cities of the second class having 7000 inhabitants, and cities organized under special charters in this state, in addition to the powers now granted shall have the further and additional powers conferred by this act as follows, 'to regulate the price of gas, electric light, water rates and to regulate and fix the charges for water meters, gas meters, electric light meters,' etc, This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract whereby the above powers are abridged."

There was no further amendment to this statute until the enactment of the Code of 1897, and until that time municipal corporations having less than seven thousand inhabitants continued to possess the power of contract as to gas rates for both public and private consumption.

The Code of 1897 conferred like and equal powers upon all municipal corporations, irrespective of whether they were cities or towns, or the number of inhabitants, and separated the private powers

conferred by Section 471 and 473 of the Code of 1873 as amended by the 22nd General Assembly from the general powers conferred upon municipal corporations by the same sections.

The private powers were incorporated in and appear as Section 720 of the Code of 1897, which is as follows:

> "Sec. 720. WATER OR GAS WORKS—ELECTRIC PLANTS. They shall have the power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town, water works, gas works, or electric light or power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants for a term of not more than twenty-five years, and may renew or extend the term of such grant; but no exclusive franchise shall be thus granted, extended or renewed. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election."

This act was afterwards amended by Chapter 44 of the 33rd G. A. permitting the approval of the franchise to be submitted at a city election.

Section 720 was further amended by Chapter 34 of the Acts of the 34th General Assembly so as to authorize its amendment or renewal and so as to require such amendment to be approved by the legal voters.

Section 720 was further amended by Chapter 66 of the 35th G. A., which is as follows:

"Chapter 66"

"Authority of cities and towns to contract to purchase heat, gas, water and electric current and to sell same."

"An Act to amend the law as it appears in Section seven hundred twenty (720) supplement to the Code, 1907, as amended by chapter forty-four (44) acts of the thirty-third (33) general assembly, and chapter thirty-four (34) acts of the thirty-fourth general assembly and to authorize cities and towns to enter into contracts to purchase heat, gas and electric current, and to sell the same.

Be it enacted by the General Assembly of the State of Iowa:

Section 1. HEAT, GAS, WATER, ELECTRIC CURRENT—BUY AND SELL. That the law as it appears in section seven hundred twenty (720) of the supplement to the code, 1907, as amended by chapter forty-four act of the thirty-third (33) general assembly, and chapter

thirty-four (34) acts of the thirty-fourth (34) general assembly, be and the same is hereby amended by adding thereto after the period following the word "renewed" in the tenth line thereof, the following: "And they shall have the power to enter into contracts with persons, corporations, municipalities for the purchase of heat, gas, water and electric current for either light or power purposes, and shall have power to sell the same either to residents of such municipality, or to others, including corporations, and to erect and maintain the necessary transmission lines therefor, whether within or without the corporate limits, to the same extent in the same manner, and under the same regulations, with the same power to establish rates and collect rents as is or hereafter may be provided by law for cities having municipally owned plants," and by inserting after the word "amended" in the twelfth line of said sections as amended by chapter thirty-four (34) acts of the thirty-fourth (34) general assembly the following; "or contract of purchase entered into."

Said Section 720, as hereinbefore set out, and as it now appears as Section 720 of the 1913 Supplement to the Code of Iowa is as follows:

"Heating plants—water or gas works—electric plants—purchase and sale of heat, gas, water and

electric current: They shall have power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town heating plants, waterworks, gas works or electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants, and lease or sell the same. They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew, amend or extend the term of such grant; but no exclusive franchise shall be thus granted, amended, extended or renewed. And they shall have power to enter into contracts with persons, corporations or municipalities for the purchase of heat, gas, water, and electric current for either light or power purposes, and shall have power to sell the same either to residents of such municipality or to others, including corporations, and to erect and maintain the necessary transmission lines therefor either within or without the corporate limits, to the same extent, in the same manner, and under the same regulation, with the same power to establish rates and collect rents as is or hereafter may be provided by law for cities having municipally owned plants. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise ex-

tended or renewed or amended, or contract of purchase entered into, unless a majority of the legal electors voting thereon vote in favor of the same at a general, city or special election.

SECTION 725. CODE OF IOWA is as follows:

Regulation of Rates and Service. They shall have the power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulation, to furnish any person applying therefore, along the line of its tubes, pipes, mains, wires, or other conduits, with gas, water, light or power and to supply said city or town with water for fire protection, with gas, water, light and power for necessary public purposes and to make and fix the rent or rate for water, gas, electric light or power; to regulate and fix the rents or rates or water, gas, electric light or power * * * and these powers shall not be abridged by ordinances, resolutions or contracts.

DIVISION FOUR

THE FACT THAT SECTION 720 OF THE SUPPLEMENT TO THE CODE HAS SPECIFIED BUT ONE CONDITION OF THE GRANT, A LIMIT OF TWENTY-FIVE YEARS, NEGATIVES THE IDEA THAT ANY OTHER CONDITION MAY BE ATTACHED TO THE GRANT.

State ex. rel. N. Y. & N. S. Traction Company vs. Public Service Commission of N. Y., 162

N. Y. Supp. 405; P. U. R., 1917, B. P. 957 Decision by N. Y. Sup. Court, Appelate Division, Third Department.

DIVISION FIVE

THE LONG SETTLED CONSTRUCTION OF THE IOWA STATUTES BY ITS HIGHEST JUDICATURE, (THE IOWA SUPREME COURT)' IS THAT, THEY DO NOT CONFER ANY POWER OR AUTHORITY UPON MUNICIPALITIES TO ENTER INTO LAWFUL AND BINDING CONTRACTS WITH PUBLIC UTILITY COMPANIES FIXING GAS, WATER, HEATING OR ELECTRIC RATES, TO BE CHARGED TO PRIVATE CONSUMERS, BUT TO THE CONTRARY PROHIBIT THE MAKING OF SUCH CONTRACTS BY THE MUNICIPALITIES.

Town of Woodward vs. Iowa Railway and Light Co., 178 N. W. 549.

Ottumwa Railway and Light Co. vs. City of Ottumwa, 178 N. W. 905.

Selkirk vs. Gas Company, 176 N. W. 301.

Iowa Railway and Light Company vs. Jones, 164 N. W. 780.

Town of Williams vs. Iowa Falls Electric Company, 170 N. W. 815.

DIVISION SIX

THE PREVIOUS HOLDINGS OF THE IOWA SUPREME COURT, CONSTRUING THE IOWA STATUTES RELATING TO THE GRANTING OF FRANCHISES AND THE REGULATION OF RATES ARE CONTROLLING UPON THE FEDERAL COURTS IN

CONSTRUING SUCH STATUTES, THE FEDERAL COURTS NOT HAVING CONSTRUED SUCH STATUTES

Raymond vs. Parish of Terrebonne, 28 Fed. 773.

(a) State Courts certainly have a right to expound the statutes of the state; and, having done so, those statutes with the interpretation given to them by the highest court of the state become the rule of decision in the Federal Courts.

Raymond vs. Parish of Terrebonne, 28 Fed. 773.
Richmond vs. Smith, 15 Wall, 429.
Jones vs. Richmond, 18 Gratt (Va.) 517.
Leffingwell vs. Warren, 2 Black 599.
Milwaukee Elec. Ry. & Lgt. Co. vs. Railroad Commission, 238 U. S. 174, 59 L. Ed. 1254 on p. 1261.

(b) The construction placed by the supreme court of a state on an act of its state legislature was controlling in United States supreme court although the result was that the latter court was thereby compelled to hold the enactment unconstitutional and void.

Hall vs. DeCuir, 95 U. S. 485, 24 L. Ed. 547.

DIVISION SEVEN

THE SETTLED CONSTRUCTION OF THE IOWA STATUTES RELATING TO GAS, HEATING, ELECTRIC, AND WATER FRANCHISES AND RATES IS SUSTAINED BY THE DECISIONS OF THE FEDERAL COURTS.

Knoxville Gas Co. vs. Knoxville, (C. C. A.) 261 Fed. 283.

Home Telephone Co. vs. Los Angeles, 211 U. S. 265.

San Antonio Company vs. City, 257 Fed. 467.

Rogers Park Co. vs. Fergus, 189 U. S. 264, 21 Sup. R. 480.

DIVISION EIGHT

THE POWERS CONFERRED BY SECTION 725 OF THE SUPPLEMENT OF THE CODE UPON MUNICIPALITIES IN RESPECT TO RATES IS GOVERNMENTAL IN CHARACTER TO BE EXERCISED BY LEGISLATION AND IS CONTINUOUS SO THAT A CITY COUNCIL MAY NOT BIND ITSELF OR ITS SUCCESSOR COUNCILS TO ANY DEFINITE RATE FOR ANY DEFINITE LENGTH OF TIME.

(a) Section 725 confers police or governmental powers to be exercised by legislation. Distinction between governmental powers of a municipality by which it governs its people and its business powers exercised for the private advantages of the municipality as a legal personality.

Illinois Trust and Savings Bank vs. City of Arkansas City, 76 Fed. 271.

(b) Section 725 Supplement of the Code confers public or governmental powers to be exercised by legislation for the regulation of transactions between public service companies and their patrons, to which the municipality is not a party.

City of Tipton vs. Tipton L. & H. Co., 176 Ia. at p. 230 et seq.

Dillon 5th Ed. Vol. 5, Sections 325.

Gas Company vs. City of Cedar Rapids, 144 Ia. 426.

Rogers Park Water Company vs. Fergus, 180 U. S. 624, 45 L. Ed. 702.

Pioneer Telegraph & Telephone Company vs. City of Oklahoma, 127 Pac. 1073.

Home Tel. Co. vs. Los Angeles, 211 U. S. 265, 53 L. Ed. 176, p. 183.

Town of Williams vs. Iowa Falls Electric Company, 170 N. W. 815.

Selkirk vs. Gas Co., 176 N. W. 301.

San Antonio Company vs. City, 257 Fed. 467.

Iowa Railway & Light Co. vs. Jones, 164 N. W. 780 (Iowa).

Knoxville vs. Knoxville Gas Co., 261 Fed. 283.

Freeport Water Co. vs. Freeport, 180 U. S. 587, 45 L. Ed. 679.

(c) Where a statute is susceptible of two constructions the one favoring the continuation or retention of the power in the state will be sustained as being the most favorable to the public.

DIVISION NINE

NEITHER THE DEFENDANT CITY OR THE PLAINTIFF COMPANY WAS BOUND BY THE RATES FOR THE THREE YEAR TERM REFERRED TO IN SECTION 3 OF THE FRANCHISE ORDINANCE.

(a) The power to regulate rates conferred on cities by Section 725 of the Code is a continuing one, and one city council may not tie up its successors by anything it may do, and the rates specified are subject to subsequent adjustment as may be deemed expedient by the city council.

Iowa Railway & Light Co., vs. Jones, 164 N. W. 780 at p. 782.

(b) The approval by electors of rates, in a franchise is merely an approval of rates temporarily settled with the understanding that the same may be changed upwards or downwards. Ottumwa Railway and Light Co. vs. City of Ottumwa, 178 N. W. 905 at p. 906.

(c) As to corporations named in Section 725, there can be no contracting that rates fixed for service shall not be changed.

Ottumwa Railway & Light Co. vs. City of Ottumwa, 178 N. W. 905 at p. 906.

(d) The fixing of maximum rates in a franchise ordinance is not a contract that such rates may not be changed before the time stated in such ordinance has lapsed.

Ottumwa Railway & Light Co. vs. City of Ottumwa, 178 N. W. 905 at p. 906.

DIVISION TEN

DEFENDANT'S ALLEGATION IN ITS AMENDED AND SUBSTITUTED ANSWER (RECORD PAGE 42) THAT "ACCEPTANCE OF THE FRANCHISE MADE A VALID AND BINDING CONTRACT FOR RATES THEREIN FIXED UNTIL THE EXPIRATION OF THE THREE YEAR PERIOD, UNLESS SOONER CHANGED BY THE CITY COUNCIL UNDER AND BY VIRTUE OF ITS POWER TO FIX AND REGULATE RATES AS PROVIDED BY STATUTE" SHOWS THE ALLEGED "CONTRACT" VOID FOR WANT OF MUTUALITY.

Iowa Railway & Light Co. vs. Jones, 164 N. W. 780 (Iowa).

Usher vs. Livermore, Vol II Cole's Iowa Reports, 117.

13 Corpus Juris 331, 332.

Town of Williams vs. Iowa Falls Elec. Co., 170 N. W. 815 (Iowa).

Dorsey vs. Packwood, 12 Howard 126, 13 (U. S.) L. Ed. 921.

Rutland Marble Co. vs. Ripley, 10 Wall 339, 19 L. Ed. 955.

Nichol vs. Wetmore, 156 N.W. 319 (Iowa).

Great Northern Ry. Co. vs. Cheyenne Telephone Co., 145 N. W. 1062.

Velie Motor Car Co. vs. Kopmeier, 194 Fed. 324

Oakland Motor Car Co. vs. Ind. Auto Co., 201 Fed. 499.

Tweedie Trading Co. vs. Parlin & Orendorff Co., 204 Fed. 50.

Ellis vs. Dodge Bros., 237 Fed. 860.

DIVISION ELEVEN

THE VOID RATE CLAUSE IN A FRANCHISE DOES NOT BIND GRANTEE ON ACCOUNT OF GRANTEE'S ACCEPTANCE OF THE FRANCHISE AS A WHOLE.

State of Iowa vs. Chariton Telephone Co., 173 Ia. 497.

Chamberlain vs. Iowa Telephone Company, 119 Iowa 699.

Doyle vs. Wilcockson, 178 N. W. at 244.

Cedar Rapids Water Co. vs. Cedar Rapids, 118 Ia., 241-255.

Cargill vs. Minnesota, 655 C. at 468, 45 L. Ed. 626.

ARGUMENT

The power of municipalities to contract must be conferred in express terms by act of the legislature, or indispensable to the exercise of a power expressly conferred by act of the legislature.

The Supreme Court of Iowa in Heins vs. Lincoln, 102 Iowa 69, at page 77 said:

> "Municipal corporations possess and can exercise only the following powers—(1st) those granted in express words; (2nd) those necessarily or fairly implied or incident to the powers expressly granted; and (3rd) those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Such are the rules laid down by Judge Dillon in his excellent work on municipal corporations, and they are undoubtedly correct. Dillon on Municipal Corporations, Sec. 89." (Also citing numerous Iowa cases.)

In Town of Akron vs. McElligott, 147 N. W. 773 (Iowa) at page 774, the court said:

> "It is well settled that the power of a municipal corporation is only such as is conferred upon it by statute, and that it has no other powers than are so conferred upon it by express legislative grant, or such as arises by necessary implication as incidental to the powers

expressly granted, or such as are indispensable to the purposes for which the municipality was created." Burroughs vs. Cherokee, 134 Iowa 429; 109 N. W. 876; Cherokee vs. Perkins, 118 Iowa 405, 92 N. W. 68; Logan vs. Paine, 43 Ia. 524; Burlington vs. Baumbardner 42 Iowa 673; Keokuk vs. Scroggs, 39 Iowa 447."

In Ottumwa Railway & Light Company vs. City of Ottumwa, 178 N. W. 905 (Iowa) (decided August 9, 1920), on page 906, the court said:

"The vital requirement is that the power to make a contract fixing permanent rates be given expressly and by 'unmistakable grant' (citing cases). The grant must be in explicit and convincing terms and all doubtful expressions are to be resolved against the power to contract for irrevocable rates. (citing cases)."

The rule is announced by the United States Supreme Court in Mitchell vs. Dakota Central Telephone Co., 246 U. S. 396, 38 Sup. C. 362, 62 L. Ed. 793, dated May 15, 1918, in the following statement:

"The grant of rights and privileges by the state to any of its municipalities are strictly construed and whatever is not unequivocally granted is withheld. Nothing passes by mere implication. Knoxville Water Co. vs. Knoxville 200 U. S. 22; Blair vs. Chicago, 200 U. S. 34."

The latest expression of the Federal courts is that of the Circuit Court of Appeals of the Sixth District, in Knoxville Gas Co. vs. City of Knoxville, 261 Fed. 283, (decided November 5, 1919) on page 287, the court said:

> "The power to establish prices to be charged by public service corporations, whether it is to be exercised by regulation or by contract, resides primarily in the state—here the state of Tennessee—admittedly it is capable of being delegated by the legislative branch of the state to its muncipailities. * * * It is enough for present purposes to say that the character of the power is governmental and the consequent importance of *conserving* it is manifest; indeed in the absence of specific provision to the contrary, it is to be interpreted as a power continuing in nature and incapable of being bartered away. Can it be safely said, then, that the state of Tennessee has both surrendered part of its own power and in effect authorized the city of Knoxville to exercise it by contract? The settled Federal rule in respect of both of these features is exacting and need not be misunderstood; it requires that the intent of the state so to give up a portion of its power must be in explicit and convincing terms—in plain words—and that doubtful expressions should be resolved in favor of the state.

"Mr. Justice Moody said in Home Telephone Co. vs. Los Angeles, 211 U. S. 265, 273, 29 Sup. Ct. 50, 52 (53 L. Ed. 176).

> 'It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, but not grossly unreasonable in point of time, and that the effect of such a contract is to suspend during the life of the contract, the governmental power of fixing and regulating the rates. * * * But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubt must be resolved in favor of the continuance of the power.' "

"Later in applying the rule as thus expressed to the power to fix street railway rates in Milwaukee Elec. Ry. vs. Wisconsin R. R. Comm., 238 U. S. 174, 180, 35 Sup. Ct. 820, 882 (59 L. Ed. 1254) Mr. Justice Day said:

> "* * * It has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction.' "

In Home Telephone & Telegraph Co. vs. Los Angeles, 211 U. S. 274, 53 L. Ed. 176, at page 182, the court:

"The surrender, by contract, of a power of government, though in certain well-defined cases, it may be made by legislative authority is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further on this point."

No power to fix or contract for rates can be implied.

The holding in Becker vs. Keokuk Water Works, 79 Iowa 419, is well stated in the second paragraph of the syllabus, which is as follows:

"The powers conferred upon municipal corporations are to be strictly construed (Clark vs.

City of Des Moines, 19 Iowa, 212; McPherson vs. Foster, 43 Iowa, 57); and the law, which authorizes cities to contract for the building and operation of waterworks by individuals or companies, confers no power to contract with such individual or company to indemnify a citizen and taxpayer for damages which he may sustain by reason of a failure to furnish water as provided in the contract, so as to enable the citizen to maintain an action therefor in his own name."

In Town of Williams vs. Iowa Falls Electric Company, 170 N. W. 815 (Iowa) at page 816, the court said:

"The legislature can give power to a town to contract that rates fixed shall not be changed for a stated period, but authority to 'regulate and fix' rates does not authorize such a contract. Power to make one can be given by unmistakable grants alone—and, without such grant, no contract that rates shall be unalterable is valid. That has support in Rosecrans vs. United States, 165 U. S. 263, 17 Sup. Ct. 302, 41 L. Ed. 708, and in U. S. vs. Jackson, 143 Fed. at pages 787, 788, 75 C. C. A. 41. This is so because enforcing such a one would, in whole or in part, extinguish an undoubted governmental power. So holds Home Telephone Co. vs. City, 211 U. S. 265, 29 S. Ct. 50, 53 L. Ed. 176."

In Mills vs. City of Chicago, 127 Fed. 731, the Circuit Court said on page 733:

> "Has the city the power by ordinance to regulate the rates of gas supply? A municipal corporation possesses only such power as is granted by the legislature in express words, or such as is fairly implied from power expressly granted, or is essential to the specific object and purposes of municipal existence. No one has pretended that the regulation of the price of gas is essential to the specific object for which the City of Chicago was created; hence that source of possible power may be dismissed without further discussion."

All doubtful expressions of the legislative grant are to be resolved against the power to contract.

In Ottumwa Railway & Lt. Co. vs. City of Ottumwa, 178 N. W. 905 (Iowa) on page 906, the court said:

> "It is not material that no statute invalidates such contract. The vital requirement is that power to make a contract fixing permanent rates be given expressly and by 'unmistakable grant,' Rosecrans vs. U. S. 165, U. S. 263, 17 Sup. Ct. 302, 41 L. Ed. 708; U. S. vs. Jackson, 143 Fed. 787, 788, 75 C. C. A. 41. The grant must be in explicit and convincing terms and all

doubtful expressions are to be resolved against power to contract for irrevocable rates. Knoxville Gas Co. vs. City (C. C. A.) 261 Fed. 283. The Supreme Court ruled in Home Telephone Co. vs. Los Angeles, 211 U. S. 274, 277, 278, 29 Sup. Ct. 54, 53 L. Ed. 176, and on review of authorities:

'All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear.' ''

In Knoxville Gas. Co. vs. City of Knoxville, 261 Fed. 283, on page 287, the court said:

"Can it be safely said that the state of Tennessee has both surrendered part of its own power and in effect authorized the city of Knoxville to exercise it by contract? The settled Federal rule in respect to both these features is exacting and need not be misunderstood. It requires that the intent of the state so to give up a portion of its power must appear in explicit and convincing terms—in plain words—and that doubtful expressions shall be resolved in favor of the state."

on page 291, the court further holds after citing Cleveland vs. Cleveland Street Railway Co., 194 U. S. 517, and Home Telephone & Telegraph Co. vs. Los Angeles, 211 U. S. 274, and other cases cited:

"The dominating principal of these decisions is that municipalities will not be regarded as possessed of the right to bind themselves to a specified public service rate and term, except only under statutes granting to them express power to contract or agree as to such rates and time, and the uniform reliance placed upon this principal in the decisions of the Supreme Court is controlling, unless a settled course of decision in the court of last resort of Tennessee requires a different conclusion. It is urged that the rule thus established as to the necessity of explicit statutory language does not prevail in the courts of Tennessee. We cannot think this accords with the decision in Knoxville Water Co. vs. Knoxville, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888."

"The surrender by contract of a power of government, though in certain well defined cases it may be made by legislative authority is a very grave act, and the surrender itself, as well as authority to make it must be closely scrutinized. No other body than the supreme legislature has authority to make such surrender, unless the authority is clearly delegated to the municipality by the supreme legislature. The general powers of a municipality are not sufficient. Specific authority for that purpose is required.

The above is a verbatim quotation from Home Telephone & Telegraph Co. vs. City of Los Angeles, 211 U. S. 265, 53 L. Ed. 176, on page 182.

In Milwaukee Electric Railway Co. vs. R. R. Comm. of Wisconsin, 238 U. S. 174, 59 L. Ed. 1254, at page 1260, the court says:

> "The fixing of rates which may be charged by public service corporations of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases cases in which the doctrine has been affirmed. The principal involved was well stated by Mr. Justice Moody in Home Teleph. & Teleg. Co. vs. Los Angeles, 211 U. S. 265, 273, 53 L. Ed. 176, 128, 29 Sup. Ct. 50."

In Portland Ry. & Lt. Co. vs. Portland, 201 Fed. 119, at page 125, the court held:

"It is enough that the authorities are agreed that the right to reasonably regulate rates to be charged by public service corporations is a governmental power, continuing in its nature, and while it may be suspended in a given case by a contract for a definite time, not grossly unreasonable in point of time, (Detroit vs. St. Ry., 184 U. S. 368, 22 Sup. Ct. 419, 46 L. Ed. 592: Vicksburg vs. Water Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155; Los Angeles vs. Water Co., 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886; Minneapolis vs. St. Ry.,215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259; Cleveland vs. St. Ry., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; Walla Walla vs. Water Co., 172 U. S. 1, 19 Supt. Ct. 77, 43 L. Ed. 341, it can only be done by words of positive grant or language equivalent thereto, and then only by the supreme legislative body of the state, unless the authority to do so is clearly delegated by it to such governmental subdivision.

'The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for the purpose is required. This proposition' says the court in Telephone Co. vs. Los Angeles, supra, 'is sustained by all the decisions of this court.' "

It is further said in that case:

"For the very reason that such a contract has the effect of extinguishing pro tanta an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power' (citing a large number of cases.)

"It was consequently held that authority to a municipality to grant a franchise to the highest bidder after public advertisement, stating the character, terms and conditions of the franchise, 'to erect or lay telephone wires * * upon any public street or highway' and 'to regulate telephone service and the use of telephones, * * * and to fix and determine the charges for telephones and telephone service and connections conferred ample authority to exercise the governmental power of regulation charges, but not 'authority to enter into a contract to abandon the governmental power itself,' notwithstanding the franchise so sold by the city provided that the charge for services should not exceed specified amounts. All the leading decisions bearing on this subject are so thoroughly and carefully reviewed and the distinctions between them pointed out by Mr. Justice Moody in the case just referred to that it is unnecessary to prolong this opinion by reference to them."

In Puget Sound T. L. & P. Co. vs. Reynolds, 223 Fed. 371, on page 375, the court said:

> "That said ordinance may constitute a contract within the meaning of the constitution is well settled—but it is equally well settled that a municipal corporation can not barter away a police power of the state by unalterably fixing rates and fares during the life of a franchise, unless specifically and expressly authorized so to do by the supreme legislative authority of the state."

Section 725 of the Code confers express powers on municipalities over gas rates, and thereby eliminates the subject from the implied general powers of general statutes.

Special statute supersedes implied powers of general statutes.

There is another objection to the claim that general powers of Section 720 would include the right to fix rates. The legislature by special statute (section 725) conferred specific power in respect to rates upon municipal corporations to be exercised in a certain way. It is elementary that a special statute conferring power upon a city council to do a thing eliminates the subject thereof from implied general powers of general statutes.

The question involved in Rosecrans vs. U. S., 165 U. S. 263, 41 L. Ed. 708, was one of jurisdiction

of the Circuit Court of the United States, and involving the construction of several statutes. It was claimed that by implication from certain general statutes, jurisdiction was given repugnant to the provisions of a special statute. At page 263, the court said:

> "When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where Congress has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation."

To the same effect is United States vs. Jackson, 143 Fed. 787, 788.

Special enactment eliminates all implied powers from other enactments of general nature on the same subject.

The case of City of Keokuk vs. Scroggs, 39 Iowa 447 involves powers of municipal corporation and holds that the general power conferred by the charter of the city was limited by the specific provisions

of amendment to the charter, which controlled as against general provisions of the original charter with respect to fire ordinances.

McBride vs. Railway Co., 134 Iowa 405, was a personal injury case involving certain rights arising under different ordinances of Des Moines relative to the use of the streets by the railway company and fire company. On page 405, it is held that the provisions of the special statute in regard to the use of streets by the fire company prevailed against conflicting provisions of general ordinances. The court says:

> "However this may be, the specific provisions of the ordinances as to the engines and carriages of the fire department constitute exceptions to the general provisions relating to teams and vehicles. That the provisions of a statute or ordinance as to a specific subject matter will prevail over general provisions, which, but for the specific provision on the same subject, would have covered the subject matter of the latter, is a proposition too elementary to require discussion."

The case of Jackson vs. C. R. I. & P. Ry. Co., 178 Fed. 434 involved a conflict between a general statute and a special or specific one, and it was held that the statutes specifically covered the subject matter and prevailed against the general statute.

Jackson vs. Cravens, 238 Fed. 120, involved the construction of conflicting statutes, and it was held

that a specific statute covering the subject matter prevails against the provisions of a general statute.

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, was a suit to enjoin the city from erecting water works. The court held that a city charter authorizing a contract for a water supply without providing for an election to ratify it although it does provide for such an election as a condition of the erection of water works by the city, supersedes a general statute that requires such election to ratify a contract for a water supply.

The only Iowa statutes relating to the conferring of powers upon municipalities to grant gas franchises to private persons or corporations and the regulation of rates for gas service are Sections 720 and 721 of the 1913 Supplement to the Code, which authorizes the granting of such franchises, and requires that they be approved by a majority vote of the legal voters, and Section 725 of the Supplement to the Code, which confers powers upon city councils to regulate and fix gas rates and does not require that such regulation or fixing be submitted to the legal voters for approval. The legislative history of these sections discloses intent to withdraw and deny any power to contract.

We do not feel that it will be contended that there is an express legislative enactment conferring upon the defendant city authority to fix rates by contract for private consumers, but defendant's

counsel intimated that in their opinion Section 720 conferred such power. The legislative history of Section 720 conclusively shows that its purpose was to confer powers upon municipalities to enable them to perform a private or business function of providing a supply of gas, water, heat and electricity for its own use, leaving the question of rates for private customers to be provided for in Section 725.

Section 720 originated in Sections 471-474 of the Code of 1873. Section 471 empowered municipal corporations to erect municipal water works. Section 473 authorized municipal corporations to grant franchises to individuals or corporations to erect water works and expressly authorized municipal corporations to contract as to rates for services rendered to the town, and also to the private consumers of the water works.

Chapter 11 of the Acts of the 22nd General Assembly made the provisions of Section 471, 472, 474 and 475 apply to gas works and electric light plants, "as fully as they do to the erection of water work." This act became effective in 1888, and thereafter and up to July 4, 1888 all municipal corporations possessed the power to contract as to rates for service to both public and private consumers.

The same legislature passed Chapter 16 of the Acts of the 22nd G. A., which became effective July 4, 1888, which conferred powers on cities of the first and second class having more than 7000 inhabitants, and special charter cities to "regulate the price of gas, electric light, water rates, and to regu-

late and fix the charges for water meters, etc." but the section also provided that the power conferred to "regulate" should not be construed to authorize the passage of an ordinance on the making of any contract whereby the above powers are abridged.

The effect of Chapter 16 of the 22nd G. A. was to take away from cities of the first and second class having over 7000 inhabitants, and cities under special charter, the right they had theretofore possessed of contracting for rates for public and private consumption, and to substitute therefor a right to "regulate," which could not be exercised by contract, and prohibited the regulation being done by contract. In other words, declaring that the regulation must be by legislative act.

Municipal corporations having less than 7000 inhabitants continued to possess the power of contracting as to rates for both public and private consumption. There was no further amendment of the statutes until the enactment of the Code of 1897.

The Code of 1897 conferred like and equal powers upon all municipal corporations irrespective of whether they were cities or towns or the number of inhabitants, and separated the private powers conferred by Sections 471-473 of the Code of 1873 as amended by the 22nd General Assembly from the public powers conferred upon municipal corporations by the same section.

The private powers were incorporated in and appear as Section 720 of the Code of 1897. This section simply provides the means by which a muni-

cipal corporation can obtain for the town and its inhabitants a supply of water, gas and electric light, by authorizing it to build a municipal plant for such purposes, or in place of building a municipal plant to grant to individuals or private corporations, the right to build a plant and serve the town and its inhabitants.

This section make no provision for what shall be charged consumers, public or private, and confers no authority upon the municipal corporation in respect thereto.

The public or governmental powers in respect to rates of charge contained in Sections 471-474 of the Code of 1873 as amended by the 22nd General Assembly were incorporated in Section 725 of the Code, but this power as to rates was limited to the right to "regulate and fix the rent or rate for water, gas, light, or power" and further provided that the power to fix and regulate "should not be abridged by ordinance, regulation or contract."

Up to that time, corporations having less than 7000 inhabitants had express power to make such contracts.

As we have heretofore noted, Chapter 16 of the 22nd General Assembly took away from cities of the first and second class having over 7000 inhabitants, and special charter cities, the right theretofore possessed of contracting as to rates, but did not impair the right conferred by Section 473 of the Code as follows:

"And such cities are authorized and empowered to enter into contracts with the individual or company constructing said works to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

And it must have been a contract of the character referred to in the above quotation which the Legislature referred to in Chapter 16 when it said that the power of regulation of rates should not be abridged by the "passage of an ordinance or resolution on the making of any contract." Section 725 substituted "or contract," for "on the making of any contract," in Chapter 16, 22nd General Assembly, thereby showing an intent to do away with contracts.

Section 725 abrogated the possibility of making any contract which should effect the regulation of rates, for it specifically provided:

"These powers shall not be abridged by ordinance, resolution or contract."

The power conferred by Section 720 upon municipal corporations was *to build a plant to manufacture the supply of gas, electric light, water or heat, which it distributed and retailed.* It *contained no* express power to purchase this supply in place of

manufacturing it, and to distribute the supply so purchased. In other words, if the municipality wanted to furnish itself and its inhabitants it had to build and operate a plant for that purpose.

In 1897 the distribution of gas through small pipe lines at high pressure was practically unknown, and the art of transmitting electricity at high voltage was in its infancy, and had not become a commerial success. Since that time, it has been perfected so that continuous service can be furnished to the small towns from high tension lines at a less expense than the evening lighting service which had theretofore been furnished from small local plants.

As heretofore said, towns owning municipal plants under the strict terms of the statute were required to run their plants and make their supply for distribution for public and private consumption. They had no legislative authority to purchase this supply even if it would enable them to give better service at lower rates. To meet this condition, Chapter 66 of the Acts of the 35th General Assembly was enacted, which permits cities and towns to enter into contracts for a supply sufficient for the complete requirements of its municipal plant, and to retail the supply so purchased. It also gave the cities and towns the right to build transmission lines to connect with the source of supply if they could not induce the person from whom they purchased the supply to make the connections. It also gave them the right to establish rates which it would charge to customers to whom it disposed of this

supply which it had purchased at wholesale .

Chapter 66 of the Acts of the 35th General Assembly of Iowa, approved April 17, 1913 was passed for the purpose of permitting municipalities to purchase a supply of gas, electricity or water for the operation of its municipal gas, electric or water plant, and to dispose of such supply after purchase, and thereby relieve the municipality of the necessity of operating its small local plant at a loss. The heading of the chapter in the official publication of the 35 G. A. is:

> "Authority of cities and towns to contract to purchase heat, gas, water and electric current and to sell the same."

The act is entitled:

> "AN ACT to amend the law as it appears in Section 720 * * * and to authorize cities and towns to enter into contracts to purchase heat, gas and electric current and to sell the same."

The title to the act is entirely silent as to rates.

Section 29 of the Constitution of Iowa provides:

"Every act shall embrace but one subject and the matters properly connected therewith, which subject shall be expressed in the title, but if any subject shall be embraced in the act, which

> shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

so that if the body of the act did authorize a contract as to rates, the same not having been expressed in the title is void.

Chapter 66 aforesaid, deals entirely with operation, service and rates of municipal plants. Section 720 of the 1913 Supplement of the Code pertains entirely to the private powers conferred upon municipal corporations for the carrying on of their regular business, where the corporation as a corporation is one party to a transaction and deals directly either in purchasing current or furnishing service.

Section 720 confers no power to regulate or fix rates.

In Selkirk vs. Sioux City Gas and Electric Co., 176 N. W., 302 (Iowa) on page 303, the court said:

> "Code Section 720 has to do with the power to grant certain rights or franchises for a term of years subject to a vote of the electors. There is no provision in that section for regulating or fixing rates. Section 725 of the statute containing the continuing governmental power of rate making with limitations on the abridgment thereof by ordinance or contract."

In Ottumwa Railway & Light Co. vs. City of Ottumwa, 178 N. W. 905 (Iowa), it was held that the provisions of street railway ordinance fixing the maximum five cent fare, which ordinance was granted by authority of Section 720 of the Code was void because there was no stautory authority conferred upon cities to fix street railway fares.

Whenever a statute is susceptible of two constructions, the one favoring the continuation or retention of the power by the state will be sustained as being the most favorable to the public.

In Freeport Water Co. vs. Freeport, 180 U. S. 587 (45 L. Ed. 679) the state statute authorized the city to grant a franchise for water works, and

> "To authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance for the period not exceeding thirty years."

The company contended that the franchise and its acceptance constituted a contract for the specific franchise rates for the period of thirty years, and the court said:

> "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which

is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existance of the power. * * * The city council has authorized to contract with any person or corporation to construct and maintain water works 'at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.' The words 'fixed by ordinance' may be constued to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. *Of the two constructions that must be adopted, which is the most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time.*"

The fact that Section 720 of the Supplement to the Code has specified but one condition of the grant of the franchise, to-wit, a limit of twenty-five years, negatives the idea that any other condition may be attached to the grant.

In State ex. rel. N. Y. & N. S. Traction Co. vs. Public Service Commission of New York, 162 N. Y. Supp. 409; P. U. R. 1917-B p. 957, the New York Supreme Court, after calling the attention to the State Constitution, which provides that

"the legislative power of the state shall be vested in the Senate and assembly"

and the clause that

"No law shall authorize the construction or operation of a street railway except upon condition that the consent also of the local authorities having control of that portion of street or highway upon which it is proposed to construct or operate such railway, be first obtained."

said:

"The legislature is prohibited from authorizing the construction or operation of a street railway except upon condition that the consent of the local authorities be first obtained; and the local authorities are prohibited from attaching conditions to the consent which assume to regulate the rate of fare, for the reason that the right to regulate the fares to be charged by public srvice corporation is essentially a legislative function. * * * As well might the legislature disregard the constitutional rights of the local authorities and itself assume to give the constitutional consent as the local authorities assume the constitutional rights of the senate and assembly to regulate regarding the rates of fare. The constitutional provision regarding the giving of consent is a restriction upon the legislature and the consti-

tutional provisions regarding legislation is a restriction upon the local authorities in the matter of attaching conditions and fixing rates of fare."

The constitution of Iowa (Article 3, Legislative Department, Sec. 1) provides "the legislative authority of this state shall be vested in the general assembly." It will be noted that this language is identical with that of the New York statute, and as the regulation of rates is a legislative function, this constitutional provision prohibits its being exercised by any other body than the general assembly, except when power so to do has been expressly delegated by the legislature.

The long settled construction of the Iowa statutes by its highest judicature (the Iowa Supreme Court) is that they do not confer any power or authority upon municipalities to enter into lawful and binding contracts with public utility companys fixing gas, water, heat or electric rates to be charged private consumers, but to the contrary prohibit the making of such contracts by the municipalities.

The facts in the case of Woodward vs. Iowa Railway and Light Company, 178 N. W. (Iowa) decided July 6, 1920, were that the town by ordinance passed by the council and approved by a vote of the electors granted an electric light franchise to the defendant, which ordinance specified the rates to be

charged private consumers for the franchise term of twenty-five years. In stating the question involved, the court said:

> "The essence of plaintiff's contention is that the enactment of this ordinance (including the franchise and the rates and the approval of same by the electors) and the practical acceptance of the same by the utility corporation, constituted a contract binding as such both upon the town and the utility corporation."

The court further said:

> "The defendant resists this contention and likewise denies that there is any power conferred by statute upon the city council to enter into contract on the subject of rates. The issue at this point is the controlling one in the case. The question thus at issue is answered by section 725 of the Code of 1897, which provides as follows:
>
> 'Sec. 725, Regulation of rates and service. They shall have the power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits with gas, water, light or power, and to supply said city or town with water for fire protection, and with gas, water, light or power for other necessary public pur-

poses. * * * and these powers shall not be abridged by ordinance, resolution or contract.'

"It will be noted from the foregoing that the legislative power to fix rates is conferred by this section upon the city council. The legislative power thus conferred is a continuing one, and may not be abridged or bartered away by contract or otherwise. The same legislative power to enact rates by ordinance is a continuing power to repeal or amend in the same manner. The power thus conferred is subject only to the constitutional limitations that the rates thus enacted shall be reasonably compensatory. There was a time in the history of our legislation when the right to contract as to rates was conferred by statute upon the city council. A comparison of certain sections in the Code of 1873 with our present section 725 is instructive on that question. Section 473 of the Code of 1873 was as follows:

'When the right to build and operate such works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years, and authorize such individual or company to charge and collect from each person supplied by them with water, such water rent as may be agreed upon between said person or corporation so building said works and said city or town; and such

cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

"By Chapter 16th, Acts of the 22nd General Assembly, this right of contract by the city council was taken away from cities having a population of 7000 or more, but was still permitted to cities of lesser population. By the revision and codification of 1897, the right to contract as to rates for utilities of this character was entirely eliminated, and the legislative power to regulate rates was conferred upon the city council in all cases. The reason for the change of method is obvious enough. Under the contract method, the rights of the public were often bartered away either ignorantly or corruptly, and utility corporations became empowered through contractual obligations to enforce extortionate rates. The net result of the progressive legislation is found in our present section 725, whereby it is forbidden to any existing city council to bind the city to any rate for any future time. The power of regulating the rate is always in the present city council. It must be said, therefore, that the rates fixed

by section 6 of the ordinance hereinbefore referred to, were not fixed by contract."

"• • • The constitutionality of the ordinance rates, like the constitutionality of a statute is always open to challenge. Indeed, the only power conferred by the legislature upon the city council is the power to establish reasonable rates and not unreasonable ones. To enact unreasonable rates, therefore, is to exceed, not only its constitutional power, but its statutory power as well. Without dwelling further upon the details of the argument, it is enough to say that the ground herein covered has been fully covered in our previous cases. Cedar Rapids Gas Co. vs. City of Cedar Rapids, 144 Iowa 426, 120 N. W. 966, 58 L. R. A. (N. S.) 1025, 138 Am. St. Rep. 299; Tipton vs. Tipton Light & Heating Co., 176 Iowa 224, 157 N. W. 844; Iowa Railway & Light Co. vs. Jones Auto Co., 182 Iowa 982, 164 N. W. 780; Selkirk vs. Sioux City Gas & Electric Co., 176 N. W. 301."

The facts in Ottumwa Railway & Light Co. vs. City of Ottumwa, 178 N.W. 905 (Iowa) were that the city by ordinance, ratified by the electors, granted the street railway franchise to the plaintiff for a term of twenty-five years, fixing a maximum five cent rate. The question involved was whether, in the absence of statutory authority to fix a permanent street railway fare, the city could do so by incorporating such a provision in the franchise. The

court states the question involved in the following manner:

> "It is very clear that the vital ground upon which the court proceeded (the trial court) rests on the conclusion that the said franchise constituted a binding contract, from which the plaintiff corporation may not be relieved • • • in other words, that the plaintiff has no more right to relief in equity than has anyone who is capable of contracting and has made a valid contract, and finds it a losing venture."

The court further says:

> "Without such clear permission the ordinance may command, but not agree. The power to fix rates is purely governmental and legislative and is in some respects the exercise of a police power. (citing cases).

The conclusion of the court is well expressed in the following paragraphs of the syllabus:

> "The city can not make a contract with a street railroad fixing the rate of fare to be charged, in the absence of a statute granting it the right to make such contract in explicit and convincing terms, even though the making of such contract is not expressly forbidden by any statute."

The court reinstated a temporary injunction, which had been granted originally by the trial court, which injunction enjoined the city from interfering with the company's charging a six cent fare, and which injunction had later been dissolved by the trial court.

The case of Selkirk vs. Sioux City Gas & Electric Co., 176 N. W. 301 (Iowa) was an action by plaintiff on behalf of himself and other gas consumers to enjoin the defendant from putting into effect and collecting increased rates for gas under and amended or new ordinance contrary to the rates fixed in the ordinance amending the franchise. There was a depmurrer to plaintiff's petition which was sustained, and plaintiff appealed. The court said:

> "We think the questions presented have been heretofore determined"

and stated that there were but two questions involved:

> "1st. That the rate ordinance constitutes a binding contract upon the defendant and (2nd) that the new ordinance amends the old one, and this could not be done because the ordinance was not submitted to a vote of the electors when the original ordinance was accepted."

The court said:

"Plaintiff cited Columbus Ry. & Light Co. vs. City of Cleveland, 254 Fed. 499 and Muscatine Light Co. vs. City of Muscatine, 256 Fed. 929."

The court stated that the Cleveland case arose under the statutes of Ohio and followed the rule laid down in Ohio, "which seems to be contrary to the general rule, and is contrary to our decisions." They further said that the case is ruled by Iowa Railway & Light Co. vs. Jones, 182 Iowa 982 (Iowa) and other cases cited, and "that all questions presented in this case are passed upon and decided adversely to plaintiff's contention under the Jones case."

The previous holdings of the Iowa Supreme Court construing Iowa statutes relating to the granting of franchises and the regulation of rates are controlling upon Federal courts in construing such statutes, the Federal courts not having construed such statutes.

The opinion in Raymond vs. Parish of Terrebonne, 28 Fed. 773 was as follows:

"This case was submitted upon an agreement that the facts were to be considered the same as those stated in the opinion of Mr. Jus-

tice Manning in Rabasse vs. Parish of Terrebonne, 30 La. Ann. 287. We are of the opinion that the construction there given of the statute authorizing the issue of the bonds in suit—the additional fact having been found by us that the plaintiff took title after that decision was made public—is binding upon this court; the question in that respect being one of local statute, and not of general commercial law. We are also of the opinion that the construction is correct, provided the questions were new."

State courts have the right to expound the statutes of the state, and having done so, those statues, with the interpretations given to them by the highest court of the state, become the rule of decision in the Federal courts.

The foregoing is an excerpt from the opinion of the Supreme Court in Richmond vs. Smith, (South Carolina), 15 Wallace 429, 21 L. Ed. 200 at page 202.

In Vincennes Bridge Co. vs. Board of Commissioners, 248 Fed. 93, decided December 31, 1917, the Circuit Court of Appeals of the Eighth District held (page 95):

"The national courts uniformly follow the construction of the Constitution and statutes of a state announced by its highest judicial tribu-

nal in all cases that involve no question of general or commercial law and no question of right under the national Constitution or the acts of congress. The character and limits of the powers and liabilities of the municipal and quasi municipal corporations of a state are general questions of state or local law."

In City of Detroit vs. Osborne, 135 U. S. 492, 34 L. Ed. 260, at page 262, the court said:

"Whatever our views may be as to the reasoning or conclusion of that court, is immaterial. It does not change the fact that its decision is the law of the State of Michigan binding upon all its courts and all its citizens and all others who may come within the limits of the State. The question presented by it is not one of general commercial law; it is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the state. While this court has been strenuous to uphold the supremacy of federal law, and the interpretation placed upon it by the federal courts, it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. *There should be, in all matters of a local nature, but one law within the state; and that law is not what this court might determine, but what the Su-*

preme Court of the State has determined. A citizen of another state going into Michigan may be entitled under the Federal Constitution to all the privileges and immunities of citizens of that state; but under that Constitution he can claim no more. He walks the streets and highways in that State entitled to the same rights and protection as, but none other than those accorded by its laws to its own citizens."

The holding in Milwaukee Electric Ry. & Lt. Co. vs. Railroad Commission, 238 U. S. 174, 59 L. Ed. 1254, is well stated in the syllabus:

"The construction given by the highest court of the state to the provisions of Wis. Rev. Stat. 198, Sec. 1862, empowering municipalities to grant the use of the streets, to the street railway companies 'upon such terms as the proper authorities shall determine,' as not authorizing a municipality to make a contract which will prevent the future exercise of the authority of the state to fix rates by legislative action, will be followed by the Federal Supreme Court."

The construction placed by the Supreme Court of the State on an act of its state legislature is controlling in the United States Supreme Court, although the result is that the latter court is compelled to hold the enactment unconstitutional and void.

The question involved in Hall vs. De Cuir, 95 U. S. 485, 24 L. Ed. 547, was the validity of a statute of the State of Louisiana which statute had been construed by the Supreme Court of Louisiana as affecting interstate commerce. The Supreme Court said:

> "Such was the construction given that act in he courts below, and it is conclusive upon us as the construction of a state law by the state courts."

The settled construction of the Iowa statutes relating to gas, heating, electric and water franchises and rates is sustained by the decisions of the Federal courts.

In Knoxville Gas Company vs. City of Knoxville, 261 Fed. 283, at page 289 of the opinion, it appears that the legislature granted a special charter to Knoxville, and provided:

> "The mayor and board of aldermen shall have the following powers by ordinance * * * to grant the right of way through the streets for the purpose of street or other railroads, and for such other purposes as the board of aldermen may provide by ordinance."

Prior to the date of the granting of the Knoxville charter, the general assembly provided for a

form of charter for a gas company, which was afterwards amended, and provided further:

> "that no one of the streets or alleys of said city shall be entered upon or used by said company for laying pipes and conductors or otherwise, until the consent of the municipal authorities shall have been first obtained and an ordinance shall have been passed prescribing the terms on which the same may be done."

In 1889, a further statute was passed, providing that one utility should have the right to acquire the property of another utility serving the same territory only by and with the consent of the town and upon such terms and conditions as the municipal government might prescribe. All of these acts were passed prior to 1903, the year in which the Knoxville Gas Company secured its charter.

Section 7 of the franchise ordinance granted by the city to the company in pursuance of the foregoing statutes, provided that the company was to furnish gas of a given candle power within the city at a price of not more than $1.10 per thousand cubic feet, less ten cents per thousand if paid by the tenth of each succeeding month of supply. The rights and consent so given were to continue for a period of fifty years from the date of the ordinance. The company furnished service at the ordinance rate until the fall of 1917, at which time it petitioned the council for an increase in rates, which was not granted, and the council thereafter passed an ordinance fixing penalties for any public utility charging more

than the lawful rate. The company brought its action in the United States District Court, praying the issuance of an injunction restraining the city from enforcing the ordinance rate. Appeal was taken from a decree denying the injunction. Warrington, Circuit Judge, delivering the opinion said:

> "The controlling question is whether in 1903 the city of Knoxville possessed the power *by contract* irrevocably to fix the maximum price of gas for a term of fifty years. If the city in reality had the power, the decree must be affirmed.
>
> "We assume that the passage of the ordinances by the city and their acceptance by the company in 1903 amounted to a binding contract between the parties as to all matters falling clearly within their respective corporate powers. In view, however, of the issue touching the price-fixing feature, it is necessary to consider whether the city could by contract of substantial duration and providing a maximum price for the supply of gas, bind the gas company, on the one hand, to accept this price in the face of intervening changes in conditions fairly calling for distinct increase in price, and commit the inhabitants of Knoxville and the municipality itself, on the other hand, to pay the price (for such quantities of gas as they might use) in spite of conditions obviously justifying material reduction in price. This is what the power

claimed means; and the far-reaching consequences that well might attend its execution, as respects both the consumer and the company, certainly demand the closest scrutiny into the disputed existence of the power.

"The power to establish prices to be charged by public service corporations, whether it is to be exercised by regulation or by contract, resides primarily in the state—here the state of Tennessee. Admittedly it is capable of being delegated by the legislative branch of a state to its municipalities. * * * It is enough for present purposes to say that the character of the power is governmental, and that the consequent importance of conserving it is manifest; indeed, in the absence of specific provision to the contrary, it is to be interpreted as a power continuing in nature and incapable of being bartered away. Can it be safely said, then, that the state of Tennessee has both surrendered part of its own power, and, in effect, authorized the city of Knoxville to exercise it by contract? The settled federal rule in respect to both these features is exacting, and need not be misunderstood; it requires that the intent of the state so to give up a portion of its power must appear in explicit and convincing terms—in plain words—and that doubtful expressions shall be resolved in favor of the state."

The court quoted from Mr. Justice Moody in Home Teleph. and Teleg. Co. vs. Los Angeles, 211 U. S. 265, 53 L. Ed. 176, as follows:

> "Authority to make prices by contract, or even by way of regulation, touching the supply of gas, is nowhere expressed among the municipal powers. Thus the claim of power in the city to, agree upon a price for gas supplied throughout the life of the ordinance in 1903, must at least rest on the right created in the city in general language to impose terms and conditions of its consent to use the highways, rather than upon language specifically authorizing it either to regulate prices or to agree upon a price. *The effect of such a claim is to ask that there be read into the statutes language which the legislature did not see fit to enact.*

And further, on page 291, the court said:

> "The dominating principle of these decisions is that municipalities will not be regarded as possessed of the right to bind themselves to a public service rate and term, except only under statutes granting to them express power to contract or agree as to such rates and time."

And on page 296:

> "The controlling question, therefore, is as stated in the opening of the opinion, whether in

1903, the city of Knoxville was clothed with power to enter into a contract irrevocably to establish the maximum price of gas for a term of fifty years. If the considerations above given to the subject are at all correct, it is perfectly plain that the question must be answered in the negative. It was consequently error in the court below to treat the provision fixing the price of gas as an irrevocable feature of the accepted ordinance. This was to ascribe to the city a contractual power which the *state* had not surrendered after all. The failure of the state to confer such power on its municipalities was purely a matter of legislative policy, and hence must be accepted as conclusive."

The powers conferred by Section 725 of the Supplement of the Code upon municipalities in respect to rates is governmental in character, to be exercised by legislation, and is continuous, so that one city council may not bind itself or its successor councils to any definite rate for any definite length of time.

The distinction between the governmental powers of a municipality by which it governs itself and its people, and its business powers exercised for a private advantage of the municipality as a legal personality, are well set forth in Illinois Trust & Sav-

ings Bank vs. City of Arkansas City, 76 Fed. 271 at page 282:

> "First, it ignores the settled distinction between the governmental, or public, and the proprietary, or business powers of a municipality, and erroneously seeks to apply to the exercise of the latter, a rule which is only applicable to the exercise of the former. A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city, and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class, it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. Dill. Mun. Cor. (3d Ed.) Sec. 66 and cases cited in the note; Safety Insulated Wire & Cable Co. vs. City of Baltimore, 13 C. C. A. 375,

377, 378, 66 Fed. 140, 143, 144; San Francisco Gas Co. vs. City of San Francisco, 9 Cal. 453, 468, 469; Com. vs. City of Philadelphia, 132 Pa. St. 288, 19 Atl. 136; New Orleans Gaslight Co. vs. City of New Orleans, 42 La. Ann. 188, 192, 7 South 559, 560; Tacoma Hotel Co. vs. Tacoma Light & Water Co., 3 Wash. St. 316, 325, 28 Pac. 516, 519; Wagner vs. City of Rock Island, 146 Ill. 139, 154, 155, 34 N. E. 545, 548, 549; City of Vincennes vs. Citizens Gaslight Co., 132 Ind. 114, 126, 31 N. E. 573, 577; City of Indianapolis vs. Indianapolis Gaslight & Coke Co., 66 Ind. 396, 403; Read vs. Atlantic City, 49 N. J. Law 558, 562, 9 Atl. 759. In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative power, but its business or proprietary powers. The purpose of such contract is not to govern its inhabitants but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Corp., Par. 27; City of Cincinnati vs. Cameron, 33 Ohio St. 336, 367; Safety Insulated Wire & Cable Co. vs. City of Baltimore, supra, and cases cited under it."

Section 725 confers public or governmental powers to be exercised by legislation for the regulation of transactions between public service companies and their patrons, to which the municipality is not a party. This section confers public powers.

In 4 McQuillin, Sec. 1736, the rule is stated:

> "The regulation of rates for public service belongs to the police power of the state • • • municipal corporations have only such portion of police power as are granted to them by the legislature in express terms or by necessary implication."

In the city of Tipton vs. Tipton Light & Heat Co., 176 Iowa 224, the question at issue was the validity of an ordinance fixing maximum rates for light and power. On page 227, the court said:

> "Section 725 of the Code of 1897 gives to cities, such as this plaintiff, power to regulate the rates to be charged for service rendered by corporations, such as this defendant. • • • The right of the state to delegate to municipalities the power therein conferred is not questioned. • • • The passage of the ordinance is a legislative act."

And again on page 230:

> "The act of a municipality in fixing a rate is purely a legislative act, done by virtue of the authority given by the legislature."

And further on page 237, the court quotes Section 913 of Abbott on Municipal Corporations, as follows:

"'Where municipal or quasi public corporations possess the power of regulation, an exercise of that power is legislative in its character.'"

On page 238, the court quoted from Dillon on Municipal Corporations, 5th Ed., Vol. 3, Sec. 1325, as follows:

"'The regulation of rates is governmental in its nature, and the power is intended to be exercised for the benfit of the inhabitants of the municipality.'"

And on page 239, the court said:

"A distinction must be kept in mind between the *power to regulate rates and the power to contract as to rates.* The regulation of rates for public service belongs to the *police power of the state,* and when delegated to the city, it belongs to the *police power of the city.*"

In Gas Light Company vs. Cedar Rapids, 144 Iowa 426, on page 431, the court said:

"The act of the municipality in fixing rates is purely legislative and as it is by virtue of authority given by the legislature, is presumed to have been in the proper exercise of the power conferred. City of Knoxville vs. Knoxville Water Co., 20 Sup. Ct. 148."

In Pioneer Teleph. Co. vs. State, et al. (Oklahoma), 127 Pac. 1073, the facts were that the state conferred power upon cities to authorize the "construction and maintenance of * * * telephone wires along or through the streets and alleys within the corporate limits and to grant franchise rights to corporations for such purposes and *to regulate same.*"

The court said:

> "The power to authorize the construction and maintenance of telephone wires along and through the streets and alleys and to grant franchise rights to corporations for such purposes, whatever else it means, certainly contains no grant of power to the municipality to fix telephone rates by franchise, or otherwise, and as part consideration therefor, as is here attempted. All the grant of power therein contained, that we can see, is the power to grant by franchise the right to construct and maintain telephone wires along the streets and alleys of the municipality under such terms of *police regulation* as may be from time to time ordained by the city."

The court further said:

> "They have no power to exact or receive compensation by way of free telephone service * * * or to fix rates for telephone charges."

In Home Teleph. & Teleg. Co. vs. Los Angeles, 53 L. Ed. 176, the facts were that the state of California had granted a special charter to Los Angeles, which gave the council power "by ordinance * * * to regulate telephone service within the city * * * and to fix and determine charges for telephones and telephone connections." The court said:

> "This is ample authority to exercise the governmental power of regulating charges but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe authority to exercise the governmental power but entirely unfitted to describe the authority to contract. It authorizes command but not agreement. Doubtless an agreement as to rates might be authorized by the legislature to be made by ordinance, but the ordinance here described was not an ordinance to agree upon charges but an ordinance 'to fix and determine the charges.' It authorizes the exercise of governmental power and nothing else. We find no other provision in the charter which by any possibility can be held to authorize a contract upon this important and vital subject."

In Town of Williams vs. Iowa Falls Elec. Co., 170 N. W. 815 (Iowa), the court said:

"The power to fix rates is purely governmental and legislative (citing cases). The fixing of rates by ordinance is in a sense an exercise of police power. Wherefore a fine is enforcible for violating the provisions of the ordinance."

In Selkirk vs. Sioux City Gas & Elec. Co., 176 N. W. 301 (Iowa), the court said:

"Section 725 is the statute containing the continuing governmental power of rate making with limitations on the abridgment thereof by ordinance or contract."

Neither the defendant city nor the plaintiff company were bound by the rates for the three year term referred to in Section 3 of the franchise ordinance.

The question in Iowa Railway and Light Co. vs. Jones, 164 N. W. 780 (Iowa), was whether one city council, by fixing a specific heating rate in a franchise ordinance, thereby deprives its successor council from authority to change that rate during the term for which the rate was fixed. The successor council changed the rate fixed in the franchise without submitting the new ordinance changing the rate to the legal voters for approval. The court said:

"The power (the right to regulate rates conferred by Section 725) is a continuing one,

and one city council may not tie up its successors by anything it may do in the matter covered by this statute. The grant of such a franchise is by the city council even though its approval by the electors of the municipality is essential to its validity. Section 776 of the Code. And the rates for service therein specified are subjct to subsequent adjustment as this may be deemed expedient or necessary by the city council."

In Ottumwa Railway & Light Co. v. City of Ottumwa, 178 N. W. 905 (Iowa), at page 906, the court said:

"That statute (Section 725) in positive terms forbids any abridgment of the right to regulate and fix the charges of service corporations named in the statute, either by ordinance, resolution or contract. No one would now contend in the teeth of the statute prohibition that there can be a valid contract fixing permanent rates. As to the corporations named in the statute, we have held repeatedly that there can be no contracting that rates for service shall not be changed."

And in referring to the Jones case, 164 N. W. 780, the court said:

"It is held that the fixing of maximum rates in a franchise ordinance is therefore not a con-

ract that such rates may not be changed before the time stated in said ordinance has elapsed, and that the approval by the electors of the rates in the franchise is merely an approval of the rates fixed by the franchise as rates temporarily settled, with the understanding that the same may be changed either upward or downward."

The facts in Town of Woodward vs. Iowa Railway & Light Co., 178 N. W. 549 (Iowa), were that the plaintiff by ordinance duly approved by a vote of the electors as required by Section 720 of the Code, granted an electric light franchise to the defendant for 25 years, which specified rates for the franchise term. The question involved was whether these rates, if confiscatory, were binding upon the company. The court, after quoting Section 725 of the Code, said:

"It will be noted from the foregoing that the legislative power to fix rates is conferred by the section upon the city council. The legislative power thus conferred is a continuing one and may not be abridged or bartered away by contract or otherwise. The power thus conferred is subject only to the constitutional limitation that the rates thus enacted shall not be confiscatory or unreasonable, but shall be reasonably compensatory."

And continuing the court recites the history of the Iowa legislation culminating in Section 725, and says:

> "The net result of the progressive legislation is found in our present Section 725, whereby it is forbidden to any existing city council to bind the city to any rate for any future time."

The court held that the company was not bound by the rate provisions in the franchise, and further said:

> "Indeed the only power conferred by the legislature upon the city council is a power to establish *reasonable rates* and not unreasonable ones. To enact unreasonable rates therefor is *to exceed not only its constitutional powers but its statutory powers, as well.* (Citing cases)."

The defendant's allegation in its Amended and Substituted Answer (Record page 42) "that an acceptance of the franchise made a valid and binding contract for rates therein fixed until the expiration of the three year period, unless sooner changed by the city council under and by virtue of its power to fix and regulate rates, as provided by statute" is an admission that the alleged contract is void for want of mutuality.

In Iowa Railway & Light Co. vs. Jones, 164 N. W. 780, the Iowa Supreme Court held that the rate provisions of a franchise ordinance, which ordinance was duly accepted by the company, were not binding upon the town, but that the city council could change the rate at pleasure.

In Town of Williams vs. Iowa Falls Elec. Co., 170 N. W. 815 (Iowa), at page 816, the court said:

> "The proposition that nothing is, in the true sense, a contract unless there is a reciprocal obligation, and unless the alleged contract is binding on both, has the approval of numerous decisions in the Supreme Court of the United States, those of other federal courts, and of courts of last resort in many of our sister states."

We refer to the following authorities:

The case of Usher vs. Livermore, Vol. II, Cole's Iowa Reports, page 117, was an action by plaintiff for performance of a contract to convey real estate. A decree was rendered dismissing the plaintiff's bill at his cost, which decree was affirmed. A statement of facts is not necessary in order to understand the principle laid down in the decision. The court said:

> "The case seems to be rather a strong instance of a call on the court to *make* contracts for the parties, or perhaps violate them. In

any view which can be taken of it, at this period of the transaction, there is a difficulty arising from the want of mutuality. Livermore holds nothing to be enforced against Usher. To give the contract any vitality after the time prescribed, at least, if not before, there should be a power of enforcing it against Usher as well as against Livermore, but it is entirely one-sided."

13 Corpus Juris, pages 331 and 332 is as follows:

"Mutuality—(1) In general, mutuality of contract consists in the obligation on each party to do, or to permit something to be done, in consideration of the act or promise of the other. Contracts lacking in mutuality are often termed unilateral contracts. Mutuality of obligation is an essential element of every enforcible agreement. Mutuality is absent when only one of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only."

The case of Dorsey vs. Packwood, 12 Howard 126, 13 L. Ed. 921, was an action by the plaintiff for the specific performance of a contract in writing by which the defendant Packwood then being the owner of a certain plantation and equipment thereof agreed with said Dorsey that as soon as Dorsey should pay one-half of the cost of the property

either with his own private means or with one-half of the profits of the plantation, Packwood would convey and transfer to Dorsey one-half of said plantation and equipment.

But the said contract also provided that it was agreed and understood by Dorsey that Packwood should have the right and privilege of selling and disposing of the plantation in any way that he saw fit without consulting or asking the consent of Dorsey and that Packwood should have the control of the plantation until sold, but in case of sale by Packwood at any time before the transfer to Dorsey, he should be answerable to Dorsey for one-half of the net profits of the sale. The United States Circuit Court, upon a hearing, dismissed the plaintiff's bill, and Dorsey appealed to the United States Supreme Court where the dismissal decree was affirmed. In the course of the opinion delivered by Mr. Justice Crier at page 926, is the following:

> "There is no allegation in the bill, or proof, that any clause was omitted from this instrument, either through mistake or inadvertence. It is signed by both parties in the presence of attesting witnesses; and is expressed in clear and precise terms. But there is one characteristic necessary to give it validity as a binding contract, in which it is entirely deficient. It wants mutuality. It imposes no obligation on Dorsey whatever. He is not bound either to render services or to pay money as a consideration for one-

half the land. Packwood could not support a suit upon it to compel Dorsey to do anything. It is not an alternative obligation, because Dorsey is not bound to perform either alternative."

In Rutland Marble Co. vs. Ripley, 10 Wall. 339, 19L. Ed. 955, the court said:

"Another reason why specific performance should not be decreed in this case, is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the Marble Company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when—from personal incapacity, the nature of the contract, or any other cause—a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. Fry, Specific Performance, Sec. 386."

In Nichol vs. Wetmore, 156 N. W. 319 (Iowa), an action was brought to recover $150 which the plaintiff deposited with the defendant as an advance payment on an alleged contract by which the plaintiff was to order from the defendant certain Hudson

automobiles. The defendant filed a counterclaim for damages on account of failure of the plaintiff to purchase and take five Hudson cars, upon each of which the defendant would have realized a profit of $80.00 and by reason of which failure the defendant was damaged to the sum of $400.00. The petition and counterclaim were both diesmissed and both parties appealed. Affirmed on defendant's appeal and reversed on plaintiff's appeal. The court said:

> "The written contract is upon its face incomplete. It will be seen that Section One thereof is simply a general promise to sell Hudson cars to the sub-dealer for a specified purpose without stating the number of cars, price or time of delivery. In Section Five is a clause which governs the price at which sales will be made, but neither the number of cars nor the time of delivery is provided for. Sections Twelve and Thirteen do state the number of cars under consideration by the parties, but plaintiff's agreement to accept and pay for the cars is restricted to the specifications in an 'attached schedule' and, as we have seen, no such schedule appears ever to have been made or attachd to the writing. Again, even if the schedule had been agreed upon and attached to the writing, Section Fifteen appears to make performance of such an agreement on the part of the defendants subject to so many exceptions and contingencies as to deprive their promise of any practical en-

forcible quality. The same contract was recently considered by the South Dakota court upon issues practically identical with those in the present case, and it was there held that the agreement was manifestly incomplete and that the dealer could not rightfully retain the deposit made by the sub-dealer or set-off against a demand for its return the anticipated profits which would have been made had the proposed sales to the sub-dealer been, in fact, effected. The court speaks of the alleged contract as a 'jug-handled' affair by which, even if it had been complete, there was no mutuality of enforcible obligation. Rosscenius vs. Wetmore (S. D.), 153 N. W. 937. By Section Three of the instrument, defendants reserved the absolute right of cancelling the same, if at any time, in their judgment, plaintiff was not properly promoting the sale of their cars, but no corresponding right was reserved to the plaintiff, and, while by Section 13 they seek to bind the plaintiff to an absolute duty of receiving and paying for a given number of cars, they provide practical immunity for themselves against liability for failure to deliver on demand. That contracts of this nature are clearly lacking in mutuality has been held in Velie vs. Kopmeier, 114 C. C. A. 284, 194 Fed. 324; Oakland vs. Ind. Auto Co., 131 C. C. A. 319, 201 Fed. 499; and Goodyear vs. Koehler, 159 App., Div. 116, 143 N. Y. Supp. 1046."

To a like effect are the holdings in Great Northern Ry. Co. vs. Cheyenne Telephone Co., 140 N. W. 1062. In this last case, the court said:

> "It is a fundamental principle true of law, that contracts in order to be binding must be mutual. * * * Taking into consideration the whole contract, we are of the opinion that by reason of want of mutuality the contract is under the circumstances unenforcible."

Oakland Motor Car Co. vs. Indiana Automobile Co., 201 Fed. 499.

Tweedie Trading Co. vs. Parlin Orendorff Co., 204 Fed. 50.

Ellis vs. Dodge Bros., 207 Fed. 860.

In this last case, the court said:

> "Under either view of the contract, therefore, its provisions are unilateral and can not be enforced for unexecuted portions thereof."

The holdings are unanimous that the right to cancel or terminate destroys the mutuality of contract.

13 Corpus Juris, pages 337, 338.

Nichol vs. Wetmore, 158 N. W. 119.

Great Northern Ry. Co. vs. Cheyenne Teleph. Co., 145 N. W. 1062.

Ellis vs. Dodge, 237 Fed. 860.

The only rates which the city council may fix are fair and reasonable rates.

In Des Moines vs. Water Co., 95 Iowa 198, the city contended that it had an absolute right to fix "an absolute standard of rates." The court held that Section 725 must be held to authorize the fixing of reasonable rates, and cited with approval Stone vs. Trust Co., 116 U. S. 307, and the following quotation therefrom:

> "This power to regulate is not a power to destroy, and limitation is not equivalent to confiscation. Under a pretense of regulating fares and freights, the state can not require a railroad corporation to carry persons or property without reward. Neither can it do that which amounts to taking of private property for public use without just compensation or without due process of law."

In City of Tipton vs. Tipton Light & Heat Co., 176 Iowa 224, on page 228, the court said:

> "By express provision the legislature has delegated the right to regulate and fix the rent or rates that may be charged. * * * In fixing these rates due regard must be had to the fact that these corporations are entitled to reasonable remuneration for services rendered."

In Town of Williams vs. Iowa Falls Electric Co., 170 N. W. 816, the Supreme Court of Iowa said:

> "The rates must at all times be reasonable, fair, adequate and non-confiscatory, since the municipality may not use its governmental power to confiscate, or the service company demand excessive rates."

In Town of Woodward vs. Iowa Railway and Light Co., 178 N. W. on page 557, the court expressly declared that the city council's power to establish rates was limited to establishment of reasonable rates and said:

> "Indeed the only power conferred by the legislature upon the city is the power to establish reasonable rates, not unreasonable ones."

In Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa 234, on page 259, the court said:

> "If the defendant assumes to exercise its right to prescribe the schedule, the rates so fixed by it must not be arbitrary or destructive of the property employed in its service. The right to regulate is not unlimited and if the schedule be made so low that its adoption will operate as a confiscation of the water company's property without due process of law, the courts will interfere to prevent its enforcement."

The void rate clause in a franchise does not bind grantee on account of grantee's acceptance of the franchise as a whole.

In Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa 234, on page 241, the court said:

> "A contract made in violation of law can not be enforced is elementary. The same is true of any contract of a municipal corporation for which there is no express or implied authority."

And on page 255, the court further said:

> "But if the authority to do the act of making the contract is expressly withheld or denied by law, that fact may always be set up as a defense to an action brought thereon."

The facts in State vs. Telephone Co., 173 Iowa 497, were that the town of Chariton had granted a franchise to the telephone company to build an exchange at a time when the statutes did not confer such authority upon the town. The ordinance was accepted by the company and the exchange built. The town claimed that the defendant company was estopped from pleading the invalitity of the franchise. The court said:

> "It (the town) had no power to grant the telephone company a charter in the year 1894, and its act in so doing was ultra vires and void.

> The acceptance of the ordinance did not estop it from claiming no valid legislative grant by the city."

In Town of Williams vs. Iowa Falls Electric Co., 170 N. W. 815 (Iowa), on page 816, the court said:

> "Next it is urged that this is not changed by any estoppel arising from the fact that the service company has proceeded under the franchise grant. This is held in State vs. Chariton Teleph. Co., 173 Iowa 497, 155 N. W. 968, and in many decisions by the Supreme Court of the United States and of other courts of high standing."

In California National Bank vs. Kennedy, 167 U. S. 362, at page 367, 42 L. Ed. 198, at pages 200, 201, 202, the question involved was whether a banking corporation could set up the invalidity of a contract which was ultra vires where it had been performed and they had still in their hands fruits of the transaction. The lower court held that they were estopped from denying liability on an ultra vires act. On Writ of Error to the Supreme Court of the United States, the ruling was reversed, and the court in the opinion says:

> "A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the

law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract can not be ratified by either party, because it could not have been authorized by either. *No performance on either side can give the unlawful contract any validity,* or be the foundation of any right of action upon it."

"As is said in McCormick vs. Market Nat. Bank, 165 U. S. 550:

" 'The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. Pearce vs. Madison & I. R. Co., 62 U. S. 21, How. 441 (16:184); Pittsburg, C. & St. L. R. Co. vs. Keokuk & H. Bridge Co., 131 U. S. 371, 384 (33:157, 161); Central Transp. Co. vs. Pullman Palace Car Co., 138 U. S. 24, 48 (35: 55, 64).

"The doctrine thus enunciated is likewise that which obtains in England. Asbury Carriage & Iron Co. vs. Riche, L. R. 7 H. L. 653; Attorney General vs. Great Eastern R. Co., L. R. 5 App. Cas. 473; Wenlock vs. River Dee Co., L. R. 12 App. Cas. 354; Trevor vs. Whitworth, L. R. 12 App. Cas. 409; Ooregum Gold Min. Co. vs. Roper (1892), A. C., 125; Mann vs. Edinburg Northern Tramways Co. (1893), A. C. 70."

Particular attention is directed to the following paragraph in the above quotation:

"The contract can not be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action on it."

The following cases are to the same effect:

Merchants Nat'l Bank vs. Wehrman, 202 U. S. 295, 50 L. Ed. 1036.

Central Transp. Co. vs. Pullman Pal. Car Co., 139 U. S. 24, 35 L. Ed. 55.

Refrig. M. Co. vs. German Sav. Inst., 44 L. Ed. on page 71.

West Penn. Chem. Co. vs. Prentiss, 236 Fed. at page 895.

Bank vs. Converse, 200 U. S. 426, 50 L. Ed. 537.

Bassick vs. Etna Exch. Co., 246 Fed. 974.

McCormick vs. Bank, 165 U. S. 538, 41 L. Ed. 817.

In Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa 234, the franchise undertook to confer rights for a longer term than 25 years, the right of the city to grant a franchise being limited to 25 years. The court said:

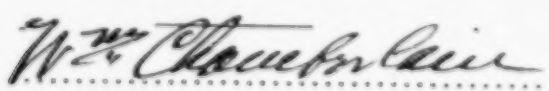
> "The invalidity of the ordinance provision referred to does not, however, effect a grant for the term of 25 years. It is entirely severable from the grant which the city was authorized to make and did make. * * * Where the contract is severable and one part or provision is void, the void provision may be rejected and the contract enforced as to the remainder."

In Cargill vs. Minn., 45 L. Ed. 619, 180 U. S. 452, the holding of the court is well expressed in the syllabus:

> "The acceptance of a license under a state law does not impose upon the licensee any obligation to respect or to comply with any provisions of the statute or any regulations prescribed by the state authorities that are repugnant to the Constitution of the United States. * * * The license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and valid rules and regulations prescribed by the commission."

In closing, counsel would say that the question involved is purely the construction of a state statute. That this statute has been construed and passed upon in a long line of cases by the supreme judicature of the state of Iowa, culminating in the Williams and Ottumwa cases; that the unanimous holding of that court has been that the Iowa statues do not confer upon cities or towns any express or implied right to contract with a utility company as to rates. That Section 725 of the Code confers a right to regulate rates by ordinance, not by agreement; that the language is the language of command, and also that this section specifically prohibits the making of contracts in relation to rates, and that any alleged contract as to rates between a municipality and any public utility company is void, and either party has a right to plead this invalidity; that the Federal courts, not having construed this section, are bound by the construction given to it by the Iowa Supreme Court—and further that the decisions of the Federal courts upon similar statutory provisions are to the same effect as holdings of the Iowa Supreme Court upon the statute involved here.

Respectfully submitted,



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Supreme Court of the United States

October Term, 1920

No. 189

IOWA ELECTRIC COMPANY,
Appellant,
vs.
CITY OF FAIRFIELD, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

John A. Reed, William Chamberlain and Ralph Maclean,
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APPELLANT'S REPLY ARGUMENT

Appellant in its brief and argument called the court's attention to the fact that the only point in this case was:

> "Has a city council authority under the statutes of Iowa, to enter into a contract with a public utility company, furnishing gas service,

fixing the prices to be charged for said gas service by said company for a definite period of time?'

The appellee admits that this question is answered in the negative by the Supreme Court of Iowa in the Town of Woodward vs. Iowa Railway & Light Company, 178 N. W. 549, and in the Ottumwa Railway & Light Company vs. City of Ottumwa, 178 N. W. 905, on two grounds:

First: That without express statutory authority a municipality did not possess the power to enter into such a contract and such express statutory authority had not been conferred.

Second: That the making of such a contract was expressly prohibited by Section 725 of the Supplement to the Code.

The appellee undertakes to evade the force of these decisions. In respect to the Woodward case it says, in effect, that it is an ill-advised and an ill-considered opinion. It forgets that the Woodward case is without dissent and is but the culmination of a long line of previous holdings collated by the court itself in the Town of Woodward case when the Supreme Court says:

> "Indeed the *only* power conferred by the legislature upon the city council *is the power to establish reasonable rates* and not unreasonable ones. To enact unreasonable rates therefore, is to exceed, not only its constitutional power but its statutory power as well. * * * It is enough to say that the ground herein covered has been fully covered in our previous cases. Cedar Rapids Gas Co. vs. City of Cedar Rapids, 144 Iowa,

426, 120 N. W. 966, 48 L. R. A. (N. S.) 1925, 138 Am. St. Rep. 299; Tipton vs. Tipton Light and Heating Co., 176 Iowa, 224, 157 N. W. 844; Iowa Railway & Light Co. vs. Jones Auto Co., 182 Iowa, 92, 164 N. W. 780; Selkirk vs. Sioux City Gas & Electric Co., 176 N. W. 301.

This line of cases covers a period of more than 12 years. Also the Woodward case is the last of a series decided by the Supreme Court with the same judges sitting as decided the Woodward case. We refer to the Jones Auto, Selkirk, Town of Williams, Town of Woodward and Ottumwa cases.

The force of the Ottumwa decision is swept aside by a mere statement that a re-hearing has been applied for. This is true but it is an application for re-hearing under circumstances, the like of which has never been known to Iowa practice and is without authority of statute or rule or precedent of the Iowa Supreme Court. It is a petition for *a rehearafter or upon a rehearing.*

The opinion of the court upon the original submission of the Ottumwa case appears at 173 N. W. 270. Afterwards the appellant applied for a re-hearing which upon argument was granted and the case ordered re-argued and re-submitted, which was done. The opinion upon re-submission appears at 178 N. W. 905 and now the appellee is asking for a second re-hearing. The re-hearing which is now applied for is not upon the ground that the court erred in holding, in both decisions, that a municipality has no power to contract as to gas and electric rates

without express statutory authority or that Section 725 of the Code prohibited the making of such a contract. The basis of the claim of error is that since the legislature has in Section 725 by statute denied the right to councils to make contracts relative to gas, electric, water and heat rates and as street car service was not included in the prohibition the legislature thereby conferred power upon or declared that cities had a right to contract as to street car rates because not expressly prohibited, and the granting of a re-hearing would not affect the force of the previous holdings in the Ottumwa case upon the issues in this case, nor the construction of Section 725.

Division 1. (*Appellees brief P.* 5.) *Have Iowa cities power to contract as to rates.*

Code Section 720 *is not the section which authorizes the city to fix rates* and the argument in support of the claim that it authorizes the fixing of rates by contract is made directly in the face of the Iowa decisions above referred to and begs the question by attempting to demonstrate by cases like the Manitowoc case, 129 N. W. (Wis.) 929, that this Iowa statute authorizes a contract when in point of fact these cases are authority only on the rule that if a statute grants a city express authority to contract it may do so. A proposition that is today a settled truism and hardly worth discussing and having no bearing whatever on whether the Iowa statute does

or does not confer such right.

It also cites in support of its contract theory the opinion in the Muscatine Light Company case 256 Fed. 929—the very opinion on which the decision in the instant appeal was rendered and of which this appeal complains.

These cases are all similar to City of Moorehead vs. Union Light H. & P. Co., 255 Fed. 920, which is as follows:

> "The city has a home rule charter adopted by the vote of the people. That charter provides that every ordinance by which a council proposes to grant any franchise shall contain all the terms and conditions of the franchise, and it shall be a feature of every franchise so granted that the maximum price of service shall be stated in the grant" * * * "*held* that the franchise was a contract on the theory that "when cities are expressly vested with power to enter into *contracts as to rates*, it is now established by repeated decisions of the Supreme Court that such contracts are binding."

It is difficult to see how decisions that a town may make such contract if it has express statutory authority so to do, prove that it has that authority under an Iowa statute which by speaking specifically denies the authority. (See appellant's brief, page 22.)

That the utility company is not here estopped by its acceptance of the franchise we believe is demonstrated in Divisions 9 and 11 of appellant's brief. The situation here is different from the sit-

nation in the cases cited by the appellee. In those cases the authority of the body passing the law which it was afterwards sought to hold unconstitutional was unquestioned and it had the right to give or refuse permission to act within any limitations it saw fit to impose while here the ultimate law making power has definitely prescribed that a subordinate legislative body may only have authority to grant or deny a particular right without the interposition of limitations. This is a situation akin to the situation in the Cargill case cited in appellant's brief at page 96 where this court spoke definitely as to the limitations upon the law making power of states and held that one who has availed himself of a right under a state law containing limitations, unconstitutional under the constitution of the United States, would not be estopped to claim such limitations void.

There is a clear distinction in the application of the principle of estoppel between cases where (a) a town has a lawful right to contract in respect to the subject matter of the agreement and (b) cases where the town does not possess any right or power to enter into a contract, but its act is ultra vires.

In cases where the town has the power to make the contract but has done so informally or without complying with all of the requisites necessary to be done and performed to make a binding contract, the other party, after accepting the benefits, is estopped to deny the power of the town to make the contract or its validity. But where the town has no power to enter into the contract but its act is wholly ultra

vires the Iowa and the Federal courts have consistently refused to confer that power by the application of the principle of estoppel. See Town of Williams vs. Iowa Falls Electric Company, 170 N. W. 815; State of Iowa vs. Chariton, 173 Iowa 699; California National Bank vs. Kennedy, 42 L. Ed. 98.

Division 2. Is the ordinance rate a contract,

Here again the appellee begs the question by the citation of cases which in effect hold that it was once the law in Iowa and may now be the law elsewhere that such contracts could be legally made and that where legally made they are not against public policy. It is worthy of note that all the Iowa cases here cited simply enforce appellant's contention that the city has no authority to do anything except to exert its legislative functions to fix reasonable rates, except the decision in the Le Mars case, 131 Iowa 14, in which the court held that a certain franchise granted under the Iowa law prior to the enactment of the Code of 1897 constituted a contract—but this was at a time when municipalities had statutory authority to make such contract and before the enactment of Section 725.

Division 3. Power to regulate rates is governmental.

(A) Here we have again the assumption that if the city council refuses to grant new rates when the

rates in force are confiscatory the person furnishing the service has no relief unless it be by mandamus but this question was settled by Judge Evans in the Woodward decision when he said:

> "The contention that the presumption of reasonable rates necessarily continues until new ordinance rates are adopted cannot be sustained. To sustain such contention would be to hold that the utility corporation has no remedy, whatever the facts might be, if the city council refused to amend the rates. *The constitutionality ofthe ordinance rates, like the constituionality of a Statute, is always open to challenge. Indeed, the only power conferred by the Legislature upon the city council is the power to establish reasonable rates and not unreasonable ones...*To enact unreasonable rates, therefore, is to exceed, not only its constitutional power, but its statutory power as well;"

and then granted injunctional relief as prayed.

The only case cited by appellee to sustain this proposition from this court is Inter State Commerce Commission vs. Railway, 42 L. Ed. 243, which was an attempt by the Commission by mandamus to compel a railway company to be governed in its future conduct by rates then prescribed and the relief was denied, which is certainly not authority that equity will not interfere to prevent a confiscation of property where, as here, there has been no jurisdictional attack and it is definitely shown by the record and by appellant's brief that the sum of money, or the right involved, is of the value of Fourteen Thousand Dollars ($14,000.00).

(C) The Benwood case cited here is not a holding that the city council has both authority to irrevocably fix rates by contract and to regulate them at the same time by legislative enactment but merely holds that legislative power reserved in a state may make such changes possible where the statute granting the city power to make the contract expressly reserved the right in the state to do so.

(E) And here again we meet with a curious attempt to make use of the cases which hold that a contract may be entered into to support the theory that the Iowa statute has granted the right to contract. This is dealt with more at length in considering Division 4 of appellee's argument.

(G) How can it help appellee that "if a contract be doubtful that such doubts should be resolved in favor of the city"? But in construing the law granting cities rights to regulate rates all doubtful expressions of the grant must be resolved against the conferring of the power on the city since it is never presumed that the state intends to grant away its police powers.

Division 4. May power to contract and power to regulate exist at the same time.

This allegation that the power to contract and the power to regulate rates are not inconsistent and may exist at the same time in the same body is argued at length commencing on page 72 of the appellee's brief and the whole contention is based on a

certain quotation from the opinion in Shreveport Traction Co. vs. Shreveport, 47 Southern (La.) 40.

That case is a holding that under Louisiana law the city of Shreveport had a right to enter into a binding contract with a street railroad by the terms of which it might irrevocably (and did irrevocably) fix the prices to be charged or that it might in that contract have stipulated that it might from time to time fix reasonable rates. It is in no sense a holding that where a statute requires a city to fix reasonable rates it can establish by contract a rate binding upon the public utility which is irrevocable though it become unreasonable. The court said in that case, in addition to language quoted in appellee's argument:

> "If a municipality has a power to grant a franchise on condition, it must necessarily have the authority to enter into an agreement binding on both parties. If the railway is bound by the tariff agreed upon, the municipality must be bound. * * * The city * * * had the power to grant the street franchise and to fix the rates of fare by agreement * * * and this contract precluded the municipality from lowering the rates during the life of the franchise."

This is a universal holding where power to contract has been conferred by the legislature. The leading cases are Detroit vs. Railway, 184 U. S. 368, and Cleveland vs. Railway, 194 U. S. 517.

(B) That there is a marked distinction between the power to regulate rates and the power to contract is true and no case can be found which holds that a

municipality can have both, although it is sometimes held that where a city is granted the right to contract the state granting the right may by the exercise of its reserve power modify the contract and even in such cases the courts have held that until the state definitely makes a change the contract exists.

This point is definitely answered by the Iowa court in the cases cited at page 23, Division 5, appellant's brief.

Division 5. Fixing rates in Iowa.

This point was anticipated and covered by Division 3, page 14 of appellant's brief and constitutes nothing additional to what was set forth therein. It is only another way of saying that the appellee does not like the construction placed upon the Iowa statute by the Iowa Supreme Court. It is answered with finality by the decisions cited on page 25 of appellant's brief read in connection with those cited on page 23 of Division 4. The allegation that the ordinance here under consideration does not "allege any attempt to fix unchangeable rates but fixes maximum rates is an unworthy attempt to make a play on words since this court and every other court to which the question has been submitted holds that if maximum rates are fixed by contract neither party has power to change the same.

Division 6. Right to injunctive relief.

If the appellee here means to make a claim that the court lacks jurisdiction of the action, the court's

attention is directed to the record—page 4—appellant's bill, wherein the appellant shows the court that *the value of the right in dispute* is of more than $3,000; and that its proprety is being taken by confiscation in violation of the constitution and to the FOUR—Maclean ffl ffiNztaoin cmfwyz admission in appellee's brief that there is now on deposit the sum of more than $14,000.00.

If it is a claim that this court should not grant injunctive relief against the enforcement of a void rate, it is answered by the citation from the Woodward case above made, and by such cases as the Knoxville Gas case, 261 Fed. 284, where it is specifically held that where a municipality attempted to force a public utility to sell its product at a rate fixed in a franchise ordinance, though the rate provision of the ordinance was not binding in that respect because of the municipality's want of power irrevocably to fix the rate for public utilities, injunction was held to be the proper form of remedy, the court saying:

> "It cannot be necessary to dwell upon the question of jurisdiction. The inevitable result of persistence on the part of the city, through penal ordinance and otherwise, to enforce the price under the prima facie showing made as to existing conditions, would be to appropriate property rights of the plaintiff in violation of the constitutional guaranties it invokes for its protection."

Division 7. Effect of Iowa construction of Iowa statutes.

That the courts of the United States follow state decisions construing local statutes, see in addition to the cases cited in appellant's original brief at page 24 the following:

Williams vs. Eggleston, 170 U. S. 304-11.
Ennis Water Works Co. vs. Ennis, 233 U. S. 652.
Crowley case, 127 U. S. 86.
Balkan case, 154 U. S. 177.
Sacirty vs. Brown, 213 U. S. 25.
Coach Co. vs. New York, 221 U. S. 467.
Old Colony Trust Co. case, 230 U. S. 100.
Williams vs. Gaylord, 186 U. S. 157.
Memphis S. R. Co. vs. Moore, 243 U. S. 229.

In its argument and brief appellee says that the decisions relied upon by appellant have all been decided since the determination of this case except the Jones case. But the cited cases are merely the culmination of a long series of cases and the development of the rule is shown in them to have been established even before the Jones case was decided—and the Iowa rule is in harmony with the decision of this court in construing statutes granting powers to cities and towns. See cases cited in appellants' brief page 25, and the quotation from the Vincennes case on page 64 thereof.

But in any event the decision of the Federal court in this case constitutes no precedent for this court in arriving at its conclusion. That this court

will follow the latest decision of the Iowa Supreme Court construing the Iowa statute is the rule of the Federal Court which is well stated in syllabus of the opinion in Southern Railway Co. vs. Commission, 99 Fed. 162, as follows:

> "The decision of the highest court of the state construing a state statute * * * will be recognized as authoritative by a Federal court * * * and where such court has independently rendered a contrary decision it will be re called if still within the court's control in deference to a later decision of the state court."

This rule was definitely applied in re Floyd & Hayes, 225 Fed. 262. In that case a Federal court was called upon to determine which of two irreconcilable opinions it should follow. The Federal opinion was rendered on Feb. 6th, 1914 and was prior to the decision of the State Supreme Court which was not filed until April 29th, 1914. In rendering decision the court said (page 265):

> "It is the duty of the Federal Court to follow the latest decisions of the State court although it may differ from prior decisions of the latter tribunal. It is likewise the duty of the Federal Court to follow the latest decision of the State court although the Federal Court may have previously come to a different conclusion. * * * Under these decisions it would appear that in the present case it is the duty of this court to follow the decisions arrived at by the Supreme Court of South Carolina. * * *"

That Judge Wade's opinion in the present case does not form a "prior decision by a Federal Court" in any event hardly needs argument. The appeal from the decision destroys its finality (Eastern Building and Loan Association vs. Welling, 103 Fed. at 355), so that it is in no sense res adjudicata and this court following Federal rules should be guided by the Iowa decisions, since as is well said in Southern Railway Company vs. Commission, 99 Fed. 165:

> "It is the practice of the Supreme Court of the United States, whose practice controls all Federal Courts, to adopt the interpretation given by the highest tribunals of the several states to their respective acts of legislature, where such interpretation does not conflict with the paramount authority of the Constitution of the United States, binding on their own courts or with the fundamental principals of justice and common right * * * *In these cases the Supreme Court will change its decision when the highest tribunal of the state has given a different interpretation.*

As before pointed out there is throughout appellee's brief a determined effort to confuse the issue by references to and quotations from cases sustaining contracts where the right to make them is expressly conferred by statute upon the city. Some of the most prominent of these cases have been noted but it is impossible within the limits of a reply argument to analyze and note them all. Nor is any effort made herein to cover by reply the claim for the alleged history of the Iowa statute set out in appellee's brief.

That history the court will find was completely covered by appellant's brief and argument and it was there shown exactly how these statutes originated without any suppression of any kind. The language over which appellee makes such contention was quoted. That the intent of the legislature by the passage of Section 725 was to take away all powers to coneract as to rates is held in the Woodward case, 178 N. W. on page 550, in unqualified terms, and this court is

> "bound to presume that, when a question arose in a state court, it was thoroughly considered in that tribunal, and that the decision rendered embodied its deliberate judgment."
>
> Cross vs Allen, 141, U. S. 539, 12 Sup. Ct. 67, 35 L. Ed 843.

Appellant respectfully submits the above answering argument to the court.

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Wm. Chamberlain

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

APPELLEE'S BRIEF AND ARGUMENT

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TOPICAL INDEX.

Page.

Statement of fact 1–5
Power to name conditions 5–7, 58–62, 75, 82–86
Power to contract 9, 24, 28–33
Power to contract not repealed 18, 25–27, 36, 37, 70, 71
Estoppel by acceptance 7, 63–69, 90
Power to regulate governmental 11, 53, 60, 102
Power to regulate is not inconsistent with power to contract 12, 73, 74, 96
Power to regulate part of contract 13, 34, 35, 106–110
Previous decisions recognize power to contract 14, 122, 136, 43
Contract no attempt to abridge power 15, 48, 49, 96
Unchangeable rate not alleged 19, 62
No jurisdiction to grant relief unless some violation of Constitution 59, 79, 88
No lack of mutuality 57, 127
Remedy, if any, mandamus or certiorari 20, 81, 82
Federal rule as to following State decisions 21, 38–40, 43, 44
Councilmen not disqualified 17, 98
Power to regulate and contract distinguished 17, 94, 109, 104
Gas company had no power to fix rates 12, 34, 105

STATUTES AND TEXT BOOKS CITED

Abbot on Municipal Corporations, Vol. 3, Sec. 915 10-93
Acts 22 G. A. Chap. 16 18-36-111-116-119
Code of Iowa, 1897, Sec. 725 12-22-26-37-42-44-102-124
Code of Iowa, 1873, Secs. 471, 472, 474 and 475 ... 23
Code of Iowa, 1897, Sec. 720 5-26-113-116-127
Code of Iowa, 1913, Supplement, Sec. 725 12-34-112-113
Corpus Juris, Vol. 12, 769 67
Corpus Juris, Vol. 13, 539 125
Corpus Juris, Vol. 13, 513, 515 135
Cyc. Vol. 9, 588 125
McClain's Annotated Code, Sec. 725 18-25
McClain's Supplement of 1892, Sec. 725 25
McQuillin on Municipal Corporations, Vol. 4, Sec. 1792 93
McQuillan on Municipal Ordinances, Sec. 578 ... 125
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Bank vs. Gadsen, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258 9-93
Bank vs. Kennedy, 167 U. S. 362, 17 Sup Ct. 831, 42 L. Ed. 198 9-93
Bank vs. Mathews, 98 U. S. 621, 25 L. Ed. 188 .. 9-93

Belfast, City of vs. Belfast Water Co., 98 Atl. 738.....8-10-90
Berg vs. Erickson, 234 Fed. 817, 148 C. C. A. 415, L. R. A. 1917A, 648.....51
Birmingham Water Works Co. vs. City of Birmingham, 211 Fed. 497, 213 Fed. 450.....13-21-39
Bismarck Gas Co. vs. District Court of Burleigh Co., 170 N. W. 878.....11-86
Bridge Co. vs. Prange, 35 Mich. 400, 24 Am. Rep. 585.....131
Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655.....10-13-14-19-22-43-49-114
Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 241.....6-129
Chas. Simon's Sons Co. vs. Maryland T. & T. Co., (Md.) 63 L. R. A. 727.....6-85
Chicago, Etc., Ry. Co. vs. Hoyt, 149 U. S. 1, 14, 15, 13 Sup. Ct. 779, 37 L. Ed. 625.....51
Chicago Gen. Ry. Co. vs. Chicago, 176 Ill. 253, 68 Am. St. Rep. 188.....5-6-8-10-82
Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 702.....123
Cleveland vs. Malden Water Works Co., 69 Wash. 541, 125 Pac. 769.....
Cole vs. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 N. W. 746, 18 L. R. A. (N. S.) 1161...126
Cook Co. vs. Chicago, 158 Ill. 526.....6-8-10-83
Collins vs. Cove, 202 Ill. 469, 66 N. E. 1079....8-91
Columbus Ry. Power & Light Co. vs. City of Columbus, 39 Sup. Ct. Rep. 349.....10-11-86-118
Columbus Co. vs. City of Columbus, 253 Fed. 499..77
Council Bluffs, City of vs. Waterman, 86 Iowa, 688.....18
Crane vs. Champ, 12 Conn. 464.....82

Daniels vs. Tearney, 102 U. S. 421, 26 L. Ed. 187 7-64-66
Dawson vs. Dawson Teleph. Co., 137 Ga. 62, 72 S. E. 508.....61
Dermott vs. Jones, 2 Wall. 1, 17 L. Ed. 762.....51
Detroit vs. Detroit Citizen's R. Co., 184 U. S. 368, 46 L. Ed. 592, 22 Sup. Ct. Rep. 419....47-123
Des Moines vs. Water Works Co., 95 Iowa, 348 9-14-15-16-21-114-125-134
Deverson vs. Eastern R. R. Co., 58 N. H. 129...7-65
Diver vs. Savings Bank, 126 Iowa, 691.....18
Doane vs. Lake Street R. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265 8-91
Dodge vs. Stickney, 61 N. H. 607.....7-65
Douglas vs. Kentucky, 168 U. S. 488.....38
Dow vs. Electric Co., 68 N. H. 59, 31 Atl. 22....7-65
Dyer vs. Walker, 40 Pa. 157.....8-91
Electric Co. vs. Dow, 166 U. S. 489, 17 Sup. Ct. Rep. 645 7-66
Emporia Telephone Co. vs. Public Utilities Commission, 154 Pac. 262.....12-88
Farnsworth vs. Boro Oil & Gas Co., 109 N. E. 860 7-11-84
Ferguson vs. Landram, 5 Push. 230, 96 Am. Dec. 350 7-64
Flournoy vs. City of Jeffersonville, 17 Ind. 169, 174, 79 Am. Dec. 468.....82
Flower vs. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149.....8-91
Fort Worth City Co. vs. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167...8-91
Franklin Telegraph Co. vs. Harrison, 145 U. S. 459, 471, 12 Sup. Ct. 900, 36 L. Ed. 776.....52

Freeport Water Co. vs. Freeport City, 180 U. S. 587, 21 Sup Ct. 493.....6-11-15-16-19-123-137
Ft. Smith Light & Traction Co. vs. City of Fort Smith, 202 Fed. 581.....13-15-19-48-123
Fulton vs. Northern Illinois College, 158 Ill. 333 6-8-10-83
Gano vs. Minneapolis, Etc., R. R. Co., 114 Iowa, 713, 87 N. W. 714, 89 Am. St. Rep. 393.....7-64
Georgia R. & Bkg. Co. vs. Smith, 128 U. S. 174, 32 L. Ed. 377, 9 Sup. Ct. Rep. 47.....19-46
Gibbs vs. Craig, 58 N. J. Law, 661, 33 Atl. 1052..8-91
Gold Mining Co. vs. Bank, 96 U. S. 640, 24 L. Ed 648 9-93
Grand Rapids & Indiana Railway Co. vs. Osborn, 24 Sup. Ct. Rep. 310.....7-66
Gulley vs. Smith, 237 U. S. 101, 115, 35 Sup. Ct. 526, 59 L. Ed. 856.....52
Harriman, The, 9 Wall, 161, 172, 173, 19 L. Ed. 629 51
Hingham, Etc., Corp. vs. County of Norfolk, 6 Allen (Mass.) 353.....8-92
Hobbs vs. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940.....126
House Teleph. Co. vs. Los Angeles, 211 U. S. 271, 53 L. Ed. 181, 29 Sup. Ct. Rep. 50.17-61-98-119
Illinois Cent. R. Co. vs. Chicago, 176 U. S. 646, 20 Sup. Ct. Rep. 509, 44 L. Ed. 622.....16-125
Indianapolis, City of, vs. Consumer's Gas Trust Co., 140 Ind. 107, 116.....6-10-15-95
Ind. Dist. vs. LeMars Light & Water Co., 121 Iowa, 14 9-14-31
In re Ganvrin, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319 53

Interstate Comm. Commission vs. Railway Co., 167 U. S. 479, 511, 17 Sup. Ct. 896, 42 L. Ed. 243 12-88
Iowa Railway & Light Co. vs. Jones Auto Co., 182 Iowa, 982 9-12-14-22-34-114-123-127
Jones vs. United States, 96 U. S. 24, 29, 24 L. Ed 644 51
Joy vs. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843 8-91
Kadish vs. Garden City Bldg. Assn., 151 Ill. 531, 42 Am. St. Rep. 256.....6-8-83
Kansas City Bolt & Nut Co. vs. K. C. L. & P. Co., 275 Mo. 529, 204 S. W. 1074.....108
Knoxville Water Co. vs. Knoxville, 189 U. S. 434, 437, 47 L. Ed. 87, 23 Sup. Ct. Rep. 531 10-15-19-44-44-49-123-123
Lee vs. Tillotson, 24 Wend. 337, 35 Am. Dec. 624..64
Logansport, Etc., Gas Co. vs. Peru (C. C.) 89 Fed 185 6-52
Manitowoc vs. Manitowoc & N. Traction Co., 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925 5-10-17-20-61-96-106
Marble Co. vs. Ripley, 10 Wall. 339, 19 L. Ed. 955.52
McCollough-Dalzell Crucible Co. vs. Philadelphia Co., 223 Pa. 336, 72 Atl. 633.....62
Miller vs. City of Webster City, 94 Iowa, 162, 62 N. W. 648.....75
Milwaukee Elec. R. & L. Co. vs. Railroad Com. 238 U. S. 174 100
Missouri Pac. R. Co. vs. Kansas ex rel Taylor, 216 U. S. 262; 30 Sup. Ct. Rep. 330.....6-8
Moorhead, City of, vs. The Union Light, Heat & Power Co., 255 Fed. 920.....10-11-20-5
Muncie Natural Gas Co. vs. Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822.....

Muscatine Lighting Co. vs. City of Muscatine, 256 Fed. 929 5-10-22-74-114-116-118
Nobelsville, City of, vs. Noblesville Gas & Imp. Co., 157 Ind. 162, 60 N. E. 1032.....10-17-94
Omaha Water Co. vs. City of Omaha, 147 Fed 1 13-17-102
Ottumwa Railway & Light Co. vs. City of Ottumwa, 173 N. W. 270.....18-37
Peterson vs. Tacoma Railway & Power Co., 60 Wash. 406, 111 Pac. 338, 140 Am. St. Rep. 936 16-125
People vs. Detroit United Ry., 162 Mich. 460, 125 N. W. 700, 127 N. W. 748, 139 Am. St. Rep. 582 16-125
People vs. Murray, 5 Hill, 468.....7-65
Phillips vs. Council Bluffs, 63 Iowa, 576.....18-41
Pioneer Telephone & Telegraph Co. vs. State, 127 Pac. 1073.....138
Pitkin vs. City of Springfield, 112 Mass. 509....7-65
Public Service Commission vs. State ex rel, 184 Ind. 273, 111 N. E. 10.....82
Pub. Utilities Com. vs. Wichita R. & L. Co., 268 Fed. 37.....109
Ragan vs. Aiken, 9 Lea. 609, 42 Am. Rep. 684..19-46
Railroad Co. vs. Railway Co., 123 Iowa, 543.....63
Red River, Etc., Bank vs. Craig, 181 U. S. 548, 21 Sup. Ct. 703, 45 L. Ed. 994.....9-92
Reynolds vs. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733.....9-93
Richardson vs. Welch, 47 Mich. 309, 11 N. W. 172 8-91
Rockport Water Co. vs. Rockport, 161 Mass. 279, 37 N. E. 168.....47
Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702..15-19-123-137

San Antonio Public Service Co. vs. City of San Antonio, 257 Fed. 476 123
Salt Lake City vs. Utah Light & Traction Co., 173 Pac. 556 17
Sausalito vs. Marin Water & Power Co., P. U. R. 1916A, 224 17-11-111
Shreveport Traction Co. vs. Shreveport, 122 La. 1, 47 Sec. 40; 129 Am. St. Rep. 345....5-16-73
Smittle vs. Haag, 140 Iowa, 492.....7-22-63-114-116
St., Etc., R. Co. vs. Houck, 120 Mo. App. 634, 97 S. W. 963 125
State vs. City of Des Moines, 96 Iowa, 521.....132
State ex rel Tacoma R. & P. Co. vs. Washington Public Service Com., 172 Pac. 890.....11-17-111
State ex rel Sedalia vs. Public Service Co., 204 S. W. 497 108
State vs. Lewis, (Ind. 1918) 120 N. E. 129....20-81
State vs. Public Service Comm. (Wash. 1918) 172 Pac. 890 19-82
State vs. Germania Bank, 90 Minn. 150, 95 N. W. 1116 8-91
State vs. Public Service Commission, 172 Pac. 890, 894 11-37
State ex rel R. R. Com. vs. Great N. R. Co., 68 Wash. 257, 123 Pac. 8.....37
State ex rel Webster vs. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C 287 13-15-20-58
Thompson vs. Mitchell, 133 Iowa, 527..7-22-114-116
Tipton, City of, vs. Tipton Light & Heating Co., 176 Iowa, 224 10-17-22-93-114
Trenton & Mercer County Traction Corporation vs. City of Trenton, 101 Atl. 562.....10-17-111

Trustees of Saratoga Springs vs. Saratoga Gas E. L. & P. Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713.....55
Turtle Creek Borrough vs. Pennsylvania Water Co., 90 Atl. 199.....13-61
U. S. vs. Central Pac. R. Co., 118 U. S. 235, 6 Sup. Ct. 1038, 30 L. Ed. 173.....126
Van Hook vs. Whitlock, 26 Wend. 43, 37 Am. Dec. 246 7-64
Vicksburg vs. Vicksburg Water Co., 206 U. S. 496-509, 27 Sup. Ct. 762, 766, 51 L. Ed. 1155 21-13-40
Water Works Co. vs. City of Creston, 101 Iowa, 687 9-14-15-19-21-122-114-136
Wellington et al., Pet'rs, 16 Pick. (Mass.) 87, 26 Am. Dec. 631 8
Western Paving & Supply Co. vs. Citizens' St. R. Co., 128 Ind. 531, 26 N. E. 188, 28 N. E. 25 Am. St. Rep. 462.....10-95
West Bloomfield, Township of, vs. Detroit U. Ry., 146 Mich. 198, 117 Am. St. Rep. 628, 109 N. W. 258 16-125
Westfield Gas & Mining Co. vs. Mendenhall, 142 Ind. 538, 41 N. E. 1033.....16-52
Williamson vs. Carlton, 51 Me. 449.....8-92
Woodburn, City of, vs. Public Service Commission, 161 Pac. 391 10-17-104
Woodward, Town of, vs. Iowa Railway & Light Co., 178 N. W. 549 35

Supreme Court of the United States

October Term, 1920

No. 189

IOWA ELECTRIC COMPANY,
Appellant,
vs.
CITY OF FAIRFIELD, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

APPELLEE'S BRIEF AND ARGUMENT

John A. Reed, William Chamberlain and Ralph Maclean,
Attorneys for Appellant.

X. C. Nady and Ralph H. Munro,
Attorneys for Appellees.

STATEMENT OF FACT

Ordinance 192, in the form of a contract, was proposed, passed, submitted to, and received the affirmative vote of a majority of, the electors of the city of Fairfield, Iowa, and was accepted in writing by the appellant's assignors. (Record pages 20, 21, 41.)

It contained the following:

"The gas company in consideration of the rights, privileges and franchises herein granted to it, agrees to and shall furnish the inhabitants of the city, gas for lighting, heating and other purposes.

'On bills rendered for monthly consumption, the rates shall be as follows:

'For the first 3,000 cubic feet, $1.375 per thousand cubit feet; * * * etc.

'The rates which grantee is entitled to charge for services from and after three (3) years after the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa." (Record pages 17, 18).

Appellant alleges:

"That Ordinance No. 192 of said City of Fairfield fixes maximum rates which may be charged for gas service rendered to the said town and its inhabitants as follows:

'For the first 3,000 cubic feet, $1.375 per thousand cubic feet," etc. (Record page 5).

The defendants answered:

"That the said City of Fairfield, Iowa, or the City Council of said City is not now, and has not since the granting of said Franchise, attempted to establish the rate contended for, but are only attempting to enforce the contract entered into by the City and the said Dows, Smith and Reed, and their successors, the Iowa Electric Company, the plaintiff herein." (Record page 21).

An amended and substituted answer was filed in which defendants plead:

> "That the City Council of the said City of Fairfield, Iowa, is .... now establishing, and has not since the granting of said franchise and its acceptance, established, or attempted to establish any rate other than as provided and agreed upon in said franchise."

In this paragraph of the answer there was a typographical omission of the word "not," at the point indicated by the dash. (Record page 41).

The omission was not noticed by appellees until after the printed record was filed in this court.

Appellant charged the rates agreed upon from about March 1, 1917, until April 30, 1918. Appellant alleged that it had placed its plant in good operating condition and operated it carefully and economically, but this question was not litigated, and was not in fact true. (Record page 45).

Appellant presented an application to the city council for higher rates, which application was not granted, and about May 1, 1918, appellant undertook to raise the rates regardless of the provisions of the franchise or the consent of the city, and notified the consumers that "the company will bill for all gas service furnished after May 1st, at $1.60 per thousand cubic feet." (Record pages 7, 8).

The city council thereupon determined to start proceedings against the plaintiff to restrain it from raising the gas rates. Plaintiff then brought this action to restrain and enjoin the city, the mayor and members of the city council, as officers of said city and as representative citizens and taxpayers of said city and customers of the plaintiff, from

interfering with the collection by plaintiff of the proposed increase in rates. (Record page 12).

Defendants, in addition to what is above stated, pleaded in answer to plaintiff's Bill of Complaint:

> "That because of the foregoing facts the rates fixed in said franchise for a period of three years from the date of the acceptance thereof constituted one of the conditions upon which the said franchise was granted, and the acceptance of said franchise by the said Dows, Smith and Reed, made said franchise a valid and binding contract for the rates therein fixed until the expiration of said three year period, unless sooner changed by the City Council under and by virtue of its power to fix and regulate rates as provided by statute." (Record pages 41, 42).

This contention was sustained by the United States District Court in a written opinion filed March 24th, 1919, and reported in 256 Fed. 929. (Record page 30-36).

Since the decision, on August 15th, 1919, there was filed an application by the plaintiff to Continue the Restraining Order, or Temporary Injunction, which had been made authorizing 45 per cent. of the existing rate to be collected and deposited in the First National Bank of Fairfield, Iowa, as a Court fund, pending appeal. (Record pages 23, 46, 50).

This order was made and thereafter until July 1st, 1920, this additional 45 per cent. was so collected and deposited, amounting to the sum of $14,892.62.

On July 1st, on application of the Iowa Electric Company, the city council increased the rates to $2.25 per thousand cubic feet upon promise of better service, but the service since that time has been wholly inefficient.

DIVISION ONE

CITIES OF IOWA HAVE THE POWER TO GRANT OR REFUSE TO INDIVIDUALS OR PRIVATE CORPORATIONS THE AUTHORITY TO ERECT AND MAINTAIN WATER, GAS, AND ELECTRIC WORKS OR PLANTS FOR A TERM OF NOT MORE THAN TWENTY-FIVE YEARS SUBJECT TO THE APPROVAL OF A MAJORITY OF THE ELECTORS OF SUCH CITY.

Code Section 720.

(a) This provision of the statute authorized the city to exact any conditions it saw fit, not unlawful in themselves or contrary to public policy.

Manitowoc vs. Manitowoc & N. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 345.

Shreveport Traction Co. vs. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345.

Muscatine Lighting Co. vs. Muscatine, 256 Fed. 929.

19 Ruing Case Law, p. 1153, par. 427.

Southern Pac. Company vs. City of Portland, 227 U. S. 559, 33 Sup. Ct. Rep. 308.

Chicago Genl. Ry. Co. vs. Chicago, 176 Ill. 253, 68 Am. St. Rep. 188.

Indianapolis vs. Gas Consumer's Trust Co., 140 Ind. 197, 49 Am. St. Rep. 183.
State vs. Corrigan Consol. St. Ry. Co., 85 Mo. 263, 55 Am. Rep. 361.
Muncie Natural Gas Co. vs. Muncie, 60 L. R. A. 822.
Westfield Gas & Mill Co. vs. Mendenhall, 142 Ind. 538.
Logansport & W. V. Gas Co. vs. Peru, 89 Fed. 185.
2 Dillin Munic. Corp. 4th Ed. par. 705.
Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. 493.
Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 234.
Missouri Pac. R. Co. vs. Kansas ex rel Taylor, 30 Sup. Ct. 330.

(b) The city, by means of such conditions, may impose obligations upon the utility company which it would have no power or authority to impose under its general charter powers.

Southern Pac. Ry. Co. vs. Portland, 227 U. S. 559.
Chicago Genl. Ry. Co. vs. Chicago, 176 Ill. 253.
19 Ruling Case Law 427.
Kadish vs. Garden City Bldg. Assn., 151 Ill. 253, 42 Am. St. Rep. 256.
Cook Co. vs. Chicago, 158 Ill. 526.
Fulton vs. Northern Illinois College, 158 Ill. 333.
Chas. Simon's Sons Co. vs. Maryland T. & T. Co., (Md.) 63 L. R. A. 727.

(c) If the utility company accepts the grant it is bound by the conditions and is estopped to question their validity.

Smittle vs. Haag, 140 Iowa, 492.
Thompson vs. Mitchell, 133 Iowa, 527.
Daniels vs. Tearney, 102 U. S. 421, 26 L. Ed. 187.
Ferguson vs. Landram, 5 Bush. 230, 35 Am. Dec. 624.
Van Hook vs. Whitlock, 26 Wend., 43, 37 Am. Dec. 246.
Gano vs. Minneapolis, etc., R. R. Co., 114 Iowa, 713, 87 N. W. 714, 89 Am. St. Rep. 393.
Dow vs. Electric Co., 68 N. H. 59, 31 Atl. 22.
Pitkin vs. City of Springfield, 112 Mass. 509.
Deverson vs. Eastern R. R. Co., 58 N. H. 129.
Dodge vs. Stickney, 61 N. H. 607.
People vs. Murray, 5 Hill, 468.
Electric Co. vs. Dow, 166 U. S. 489, 17 Sup. Ct. Rep. 645.
Grand Rapids & Ind. Ry. Co. vs. Osborn, 24 Sup. Ct. Rep. 310; 12 Corpus Juris 769.
Farnsworth vs. Boro Oil & Gas Co., (N. Y.) 109 N. E. 860.
Pond vs. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cases, 504.

(d) The utility company cannot retain the benefits of the franchise and repudiate the burdens on plea of ultra vires, or want of authority on the part of the city to make the condition.

Chicago Genl. Ry. Co. vs. Chicago, 176 Ill. 253, 68 Am. St. Rep. 188.
Kadish vs. Garden City, etc., Bldg. Ass'n. 151 Ill. 531, 42 Am. St. Rep. 256.
Cook County vs. Chicago, 158 Ill. 526.
Fulton vs. Northern Ill. College, 158 Ill. 333.
City of Balfast vs. Belfast Water Co., 98 Atl. 738.
Ft. Worth City Co. vs. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167.
Richardson vs. Welch, 47 Mich. 309, 11 N. W. 172.
Doane vs. Lake Street, etc., R. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265.
Collins vs. Cobe, 202 Ill. 469, 66 N. E. 1079.
State vs. Germania Bank, 90 Minn. 150, 95 N. W. 1116.
Gibbs vs. Craig, 58 N. J. Law 661, 33 Atl. 1052.
Flower vs. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149.
Dyer vs. Walker, 40 Pa. 157.
2 Pars. on Contracts, 961.
Joy vs. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843.
Fidelity Insurance Co. vs. Bank, 127 Iowa, 591.

(c) The municipality only can complain of lack of authority to contract.

Williamson vs. Carlton, 51 Me. 449.
Wellington et al., Petr's, 16 Pick. (Mass.) 87, 26 Am. Dec. 631.
Hingham, etc. Corp. vs. County of Norfolk, 6 Allen (Mass.) 353.

Red River, etc., Bank vs. Craig, 181 U. S. 548, 21 Sup. Ct. 703, 45 L. Ed. 994.

(f) Ultra Vires transactions are utterly void when made the basis of suit to charge a bank with liability but when the bank seeks to enforce advantages obtained through such transactions, even though they are impliedly forbidden, they are valid unless questioned by the government.

Bank vs. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198.
Gold Mining Co. vs. Bank, 96 U. S. 640, 24 L. Ed. 648.
Bank vs. Mathews, 98 U. S. 621, 25 L. Ed. 188.
Reynolds vs. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733.
Bank vs. Gadsen, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258.

DIVISION TWO

ORDINANCE 192 WAS IN THE NATURE OF A CONTRACT AND THE RATES THEREIN SPECIFIED CONSTITUTED ONE OF THE CONDITIONS UPON WHICH THE FRANCHISE WAS GRANTED.

Des Moines vs. Waterworks Co., 95 Iowa, 348.
Waterworks Co. vs. City of Creston, 101 Iowa, 687.
Ind. Dist. vs. Le Mars Light & Water Co., 131 Iowa, 14.
Iowa Railway & Light Co. vs. Jones Auto Co., 182 Iowa, 982.

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655.

Knoxville Water Co. vs. Knoxville, 189 U. S. 434.

City of Moorhead vs. Union Light, Heat & Power Co., 255 Fed. 920.

Muscatine Lighting Co. vs. Muscatine, 256 Fed. 929.

Chicago General Railway Co. vs. Chicago, 176 Ill. 253.

Cook County vs. Chicago, 158 Ill. 526.

Fulton vs. Northern Illinois College, 158 Ill. 333.

Columbus Ry., Power & Light Co. vs. City of Columbus, 39 Sup. Ct. Rep. 349.

City of Belfast vs. Belfast Water Co., 98 Atl. 738.

City of Tipton vs. Tipton Light & Heating Co., 176 Iowa, 224.

Abbott on Munic. Corp. Vol. 3, Sec. 915.

Noblesville vs. Noblesville Gas & Imp. Co., 157 Ind. 162, 60 N. E. 1032.

City of Indianapolis vs. Consumer's Gas Trust Co., 140 Ind. 107.

Western Paving & Supply Co. vs. Citizen's St. R. Co., 128 Ind. 531, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462.

Manitowoc vs. Manitowoc, etc. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056.

City of Woodburn vs. Public Service Co., 161 Pac. 391.

Trenton & Mercer County Traction Corp. vs. Trenton, 101 Atl. 562.

State ex rel Tacoma R. & P. Co. vs. Wash. Pub. Service Com., 172 Pac. 890.

Sausalito vs. Marin Water & Power Co., P. U. R. 1916A, 244.

Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. 493.

Columbus Ry., Power & Light Co. vs. City of Columbus, 253 Fed. 499.

City of Moorhead vs. Union Light, Heat & Power Co., 255 Fed. 920.

(a) Conditions in franchise ordinances fixing rates are not unlawful or against public policy.

Farnsworth vs. Boro Oil & Gas Co., 109 N. E. 860.

Dusenberry vs. N. Y. & C. T. Co., 46 App. Div. 267, 61 N. Y. Supp. 420.

Simons Sons Co. vs. Md. Tel. & T. Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

Mere T. & D. Co. vs. Collins R. R. Co. (C. C.) 101 Fed. 347.

Bismarck Gas Co. vs. District Court, 170 N. W. 878.

DIVISION THREE

THE POWER TO REGULATE RATES IS GOVERNMENTAL.

(a) The Gas company had no power to fix the rate, and the Court had no power to fix the rate either directly, or indirectly, by restraining the city, the members of the city

council, and the consumers, from interfering with the collection of a rate fixed by the Gas company.

Pocatello vs. Murray, 21 Idaho, 180, 120 Pac. 812.
Emporia Telephone Co. vs. Public Utilities Commission, (Kansas, 1916), 154 Pac. 262.
Interstate Comm. Commission vs. Railway Co., 167 U. S. 479, 511, 17 Sup. Ct. 896, 42 L. Ed. 243.

(b) The Iowa statute, Sec. 725, Code Sup. 1913, authorizes the city council to fix the rate; **but, in the absence of its exercise or of any contract,** the company furnishing the service may fix and demand reasonable compensation for such service. Here the rate is defined by the terms of the franchise granted, which is in the nature of a contract between the company and the municipality.

Iowa R. & L. Company vs. Jones Auto Co., 182 Iowa, 982.

(c) The authority granted to a municipal corporation to contract for a water or gas supply includes the power to agree upon the rates to be charged for a definite period, notwithstanding the power to regulate rates is recognized as legislative or governmental.

Benwood vs. Public Service Com. W. Va. Sup. Ct. 83 S. E. 295, 1915—C, L. R. A. 261, note on page 267.

Bessemer vs. Bessemer City Waterworks, 152 Ala. 391, 44 So. 663.

Birmingham Waterworks Co. vs. Birmingham, 211 Fed. 497, affirmed in 213 Fed. 450.

Vicksburg vs. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. Ed. 1155, 27 Sup. Ct. Rep. 762.

Ashland vs. Wheeler, 88 Wis. 607, 60 N. W. 818.

Omaha Water Co. vs. Omaha, 12 L. R. A. (N. S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cases, 614, 207 U. S. 584, 52 L. Ed. 351, 28 Sup. Ct. Rep. 262.

State vs. Railway, 159 Iowa, 259, 281.

State ex rel Webster vs. Superior Court, 67 Wash. 37, 120 Pac. 861, 1915—C, L. R. A. 287.

Turtle Creek Borough vs. Pennsylvania Water Co., 90 Atl. 199.

(d) The law giving municipalities the power to regulate and fix rates was in force at the time of the passage of the ordinance and its acceptance, and hence became a part of the contract between the city and the plaintiff as the successor of the original grantee of the franchise.

Ft. Smith Light & Traction Co. vs. City of Ft. Smith, 202 Fed. 581.

Arkadelphia Electric Light Co. vs. Arkadelphia, 99 Ark. 178, 137 S. W. 1093.

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655.

Tampa Waterworks Co. vs. Tampa, 199 U. S. 241, 50 L. Ed. 170, 26 Sup. Ct. Rap. 23, 45 Fla. 600.

Lackey vs. Fayetteville Water Co., 80 Ark. 108, 96 S. W. 622.

Ellis vs. Tampa Waterworks Co., 56 Fla. 858, 19 L. R. A. (N. S.) 183, 47 So. 358.

Pocatello vs. Murray, 21 Idaho, 180, 120 Pac. 812.

Iowa Railway & Light Company vs. Jones Auto Company, 182 Iowa, 982.

(e) The power of the city and the voters thereof to fix a maximum rate, or a rate stated for a reasonable period of time, subject to the power of the city council to regulate and fix other rates, has long been recognized by the Iowa Supreme Court, the Supreme Court of the United States, and other courts generally, regardless of the number of inhabitants of the city.

Waterworks Company vs. City of Creston, 101 Iowa, 687.

Des Moines vs. Waterworks Co. 95 Iowa, 348.

Independent School District of Le Mars, Iowa, vs. Le Mars Light & Water Co., 131 Iowa, 14.

State vs. Railway, 159 Iowa, 259.

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655, 32 Sup. Ct. Rep. 389, 56 L. Ed. 594.

Benwood vs. Public Service Commission, L. R. A. 1915 C, page 261.

Pinney & Boyle Co. vs. Los Angeles Gas & E. Corp. 141 Pac. 620, L. R. A. 1915 C, pag 282.

State ex rel Webster vs. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915 C page 287.

(f) The City by the ordinance did not undertake to surrender any right or power it had.

Ft. Smith Light & Traction Co. vs. City of Ft. Smith, 202 Fed. 581.

Knoxville Water Company vs. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. E. 887.

Portland R. Light & P. Co. vs. Portland, 201 Fed. 119, followed in Portland, R. Light & P. Co. vs. Portland, 210 Fed. 667.

Waterworks Co. vs. City of Creston, 101 Iowa, 687.

Indianapois vs. Indianapolis, etc. Co., 66 Ind. 396.

Indianapolis vs. Consumer's Gas Trust Co., 140 Ind. 107, 49 Am. St. Rep. 183.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S. 650.

Beach on Public Corporation, secs. 713, 990, 1229, 1230.

Des Moines vs. Waterworks Co., 95 Iowa, 348, 357.

Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. 493.

Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 21 Sup. Ct. 490.

Des Moines vs. Welsbach St. Lighting Co., 188 Fed. 906.

(g) If the contract be doubtful, such doubt should be resolved in favor of the city and against the utility company.

Peterson vs. Tacoma Ry. etc. Co., 60 Wash. 406, 111 Pac. 338, 140 Am. St. Rep. 936.
Des Moines Waterworks Co. vs. Des Moines, 95 Iowa, 348.
Illinois Cent. R. Co. vs. Chicago, 176 U. S. 646, 20 Sup. Ct. Rep. 509, 44 L. Ed. 622.
People vs. Detroit United Ry., 139 Am. St. Rep. 582, 162 Mich 460, 125 N. W. 700, 127 N. W. 748.
Township of West Bloomfield vs. Detroit U. Ry., 146 Mich. 198, 117 Am. St. Rep. 628, 109 N. W. 258.
Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. 493.
Long Island Water-Supply Co. vs. City of Brooklyn, 17 Sup. Ct. Rep. 718.

DIVISION FOUR

THE POWER TO CONTRACT AND THE POWER TO REGULATE AS TO RATES ARE NOT INCONSISTENT, AND BOTH MAY EXIST AT THE SAME TIME IN THE SAME CITY COUNCIL, OR OTHER LEGISLATIVE BODY.

Shreveport Traction Co. vs. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345.

(a) City councilmen are not disqualified because of their interest.

Home Tel. & T. Co. vs. Los Angeles, 211 U. S. 265, 53 L. Ed. 176, 29 Sup. Ct. Rep. 60.

(b) There is a marked distinction between the power to regulate and the power to contract.

City of Tipton vs. Tipton Light & Heating Co. 176 Iowa, 224.
City of Noblesville vs. Noblesville Gas & Imp. Co., 157 Ind. 162, 60 N. E. 1032.
Manitowoc vs. Manitowoc, etc. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056.
Omaha Water Co. vs. City of Omaha, 147 Fed. 1.
City of Woodburn vs. Public Service Co., 161 Pac. 391.
Salt Lake City vs. Utah Light & Traction Co., 173 Pac. 556.
Trenton & Mercer County Traction Corp. vs. City of Trenton, 101 Atl. 562.
State ex rel Tacoma R. & P. Co. vs. Washington Public Service Commission, 172 Pac. 890.
Sausalito vs. Marin Water & Power Co., P. U. R. 1916A, 244.

DIVISION FIVE

APPELLANT CONCEDES, AND THE DECISIONS OF THE IOWA SUPREME COURT HOLD, WITHOUT QUALIFICATION, THAT PRIOR TO THE PASSAGE OF CHAPTER 16 OF THE 22ND GEN. ASSEM. ALL CITIES OF IOWA HAD POWER TO FIX RATES BY CONTRACT.

Appellant's Argument page 46.

(a) Chap. 16, 22nd G. A., however did **not** have the effect of taking away from cities of over 7000 the right they had theretofore possessed of contracting for rates, but provided, in express terms, for **further and additional** powers.

McClain's Annotated Code Sec. 725.
City of Council Bluffs vs. Waterman, 86 Iowa, 688.
Phillips vs. City of Council Bluffs, 63 Iowa, 576.
Lambe vs. McCormick, 116 Iowa, 169.
U. S. vs. Freeman, 3 How. 556, 11 L. Ed. 724.
State vs. Gerhardt, 145 Ind. 439, 33 L. R. A. 313.
Sherman vs. City of Des Moines, 100 Iowa, 88.
City of Dubuque vs. Harrison, 34 Iowa, 163.
Ament vs. Humphrey, 3 Greene (Iowa) 255.
State vs. Iowa Tel. Co., 175 Iowa, 607.
Diver vs. Savings Bank, 126 Iowa, 691.

(b) The Supreme Court of Iowa has held that the language used in the Code of 1897 was, in effect, a substantial re-enactment of the provisions of Chap. 16, 22nd G. A.

Ottumwa Railway & Light Co. vs. City of Ottumwa, 173 N. W. 270.

(c) Intention on the part of the municipality to abridge its power to regulate rates cannot be implied from the language used in the ordinance in question.

Knoxville Waler Company vs. Knoxville, 189 U. S. 434, 47 L. Ed. 887, 23 Sup. Ct. Rep. 531.

Georgia R. & Bkg. Co. vs. Smith, 128 U. S. 174, 32 L. Ed. 377, 9 Sup. Ct. Rep. 47.

Ragan vs Aiken, 9 Lea 609, 42 Am. Rep. 684.

Ft. Smith Light & Traction Co. vs. City of Ft. Smith, 202 Fed. 581.

Arkadelphia Electric Light Co. vs. Arkadelphia, 99 Ark. 178, 137 S. W. 1093.

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 233 U. S. 655.

Waterworks Company vs. City of Creston, 101 Iowa, 687.

Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. Rep. 493.

Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 21 Sup. Ct. Rep. 490.

State vs. Public Service Co., 172 Pac. 890.

(d) Appellant's Bill of Complaint does not allege any attempt to fix unchangeable rates, but alleges that the Ordinance No. 192, fixes maximum rates.

Appellant's Printed Record, Page 5.

DIVISION SIX

UNDER THE CONSTITUTION OF THE UNITED STATES THE JUDICIAL POWER OF THE GENERAL GOVERNMENT IS VESTED IN THE SUPREME COURT, AND SUCH INFERIOR COURTS AS CONGRESS SHALL FROM TIME TO TIME ORDAIN AND ESTABLISH. EVERY COURT OF THE UNITED STATES, THEREFORE, MUST DERIVE

ITS JURISDICTION AND JUDICIAL AUTHORITY FROM THE CONSTITUTION OR THE LAWS OF THE UNITED STATES.

Federal Statutes Annotated 2nd Ed. Vol. 11, page 98.

(a) Jurisdiction must affirmatively appear.

Turner vs. Bank of North America, (1799) 4 Dall. 11, 1 U. S. (1. ed.) 718.
Vol. 11, page 100, 2nd Ed. Fed. Stat. Ann.

(b) A remedy by Certiorari or Mandamus would be the only available remedy, if any exists in the courts.

Collingwood Sewerage Co. vs. Borough of Collingwood, (New Jersey, 1918), 102 Atl. 901.
State vs. Lewis, (Indiana, 1918), 120 N. E. 129.

(c) The remedy, however, is political and not judicial.

Benwood vs. Public Service Com., 1915C, L. R. A. 261.
State ex rel Webster vs. Superior Court, 67 Wash. 37, 120 Pac. 861. L. R. A. 1915C, 287.
Manitowoc vs. Manitowoc & U. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 345.
City of Moorhead vs. Union Light, Heat & Power Co., 255 Fed. 920.

DIVISION SEVEN

THE RULE THAT THE UNITED STATES COURTS WILL FOLLOW DECISIONS OF THE STATE COURTS CONSTRUING THEIR OWN STATUTES HAS NO APPLICATION TO THIS CASE.

(a) Where the state courts hold that a contract right exists, instead of denying it, there is reason for following the state courts ruling.

Birmingham Waterworks Co. vs. City of Birmingham, 211 Fed. 497.

(b) This rule, however, is limited to such construction given to similar charters at the time the contract was made.

Birmingham Waterworks Co. vs. Birmingham, 211 Fed. 497.
Vicksburg vs. Vicksburg Water Co., 206 U. S. 496-509, 27 Sup. Ct. 762, 766, 51 L. Ed. 1155.
Raymond vs. Terrebonne, 28 Fed. 773.

(c) The decisions of the Supreme Court of Iowa, of the federal courts generally, and of the United States Supreme Court, prior to the making of the contract in question, sustain such contract right.

Des Moines vs. Waterworks Co., 95 Iowa, 348.
Waterworks Co. vs. City of Creston, 101 Iowa, 687.

Iowa Ry. & Light Co. vs. Jones Auto Co., 182 Iowa, 982.

City of Tipton vs. Tipton Light & H. Co., 176 Iowa, 224.

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655, 32 Sup. Ct. Rep. 389, 56 L. Ed. 594.

Muscatine Lighting Co. vs. Muscatine, 256 Fed. 929.

Smittle vs. Haag, 140 Iowa, 492.

Thompson vs. Mitchell, 133 Iowa, 527.

ARGUMENT

As a leading inducement to secure the approval of the members of the city council, the voters at the special election, and the consumers of gas, Dows, Smith and Reed, the promoters who were seeking the franchise in question, proposed and agreed that for a period of three years, the rates to be charged for gas should be $1.375 per thousand cubic feet, subject to the power of the city council to "regulate and fix" other rates, under the power retained by the city under Sec. 725 of the Code.

In presenting to the city council their application for increased rates Mr. John A. Reed conceded that there had been very little increase in the cost of production since the acceptance of the franchise by the company, but insisted that the company had considered such increased cost, which was apparent at the time of the acceptance of the franchise, as only temporary, and that they had now found it to be more prolonged than had been expected. Later, in presenting the matter in court, Mr. Reed, sug-

gested that he had regarded the clause as to rates as legally ineffective, and believed from the beginning, that he could secure the franchise on the strength of such an inducement and then legally disregard the rate clauses, and still hold the franchise and all rights and privileges going with it, without being in any manner affected by such clauses.

His position in this Court now is that he and his company, the Iowa Electric Company, can retain, use and enjoy all of the rights, privileges and things of value secured by the franchise, and repudiate the condition as to rates upon which the franchise was secured. And that his company had the right to raise the rate from $1.375 to $1.60 per thousand cubic feet, and an order of this Court to restrain the city, the city council, the consumers, tax payers, and patrons of the company, from interfering with the collection of such proposed increase in rates.

No court, so far as we are able to ascertain, has ever made any such decision.

Appellant concedes, and states in argument, that after Chapter 16 of the Acts of the 22nd Gen. Assem. made the provisions of Sections 471, 472, 474 and 475 apply to gas works, which Act became effective in 1888, and thereafter and up to July 4, 1888, all municipal corporations possessed the power to contract as to rates for service to both public and private consumers. (Arg. page 46).

Appellant then says:

> "The same legislature passed Chapter 16 of the Acts of the 22nd G. A., which became

> effective July 4, 1888, which conferred powers on cities of the first and second class having more than 7000 inhabitants, and special charter cities to 'regulate the price of gas, electric light, water rates, and to regulate and fix the charges for water meters, etc.,' but the section also provided that the power conferred to 'regulate' should not be construed to authorize the passage of an ordinance on the making of any contract whereby the above powers are abridged."

Appellant then argues that the effect of Chapter 16 of the 22nd G. A. was to take away from cities of the first and second class having over 7000 inhabitants, the right they had theretofore possessed of contracting for rates, and to substitute therefor a right to "regulate." (See Appellant's argument, page 47).

We are unable to see how such a construction can be placed upon the Act in question without doing violence to the English language.

The original statute, Sec. 473, above referred to, reads as follows:

> "When the right to build and operate such works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years, and authorize such individual or company to charge and collect from each person supplied by them with water, such water rent as may be agreed upon between said person or corpor-

ation building said works, and said city or town; and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

Chapter 16 G. A. Par. 1, McClain's Annotated Code, Sec. 725, reads as follows:

"Additional Powers. All cities of the first class and cities of the second class having over seven thousand inhabitants and cities organized under special charters in this state **in addition to the powers now granted**, shall have the **further and additional powers** conferred by this act, as follows, towit: They shall have power to establish, build and regulate market houses, * * *; to regulate the price of gas, electric light, water rates * * *. This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract, whereby the above powers are abridged."

The same language will be again found in Sec. 725 of McClain's Supplement of 1892, the material part of which reads:

"All cities * * * having over seven thousand inhabitants * * * **in addition** to the pow-

ers now granted, shall have the **further and additional powers** conferred by this act, as follows, to-wit; * * * to regulate the price of gas, electric light, water rates and to regulate and fix the charges for water meters, gas meters, electric light meters, and any other device or means necessary for determining the consumption of gas, water or electric light. This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract, whereby the above powers are abridged."

Section 720 of the Code of 1897 provides:

"They shall have power to purchase, establish, erect, maintain and operate * * * gas works * * * and lease or sell the same. They **may** also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, etc."

Section 725 provides:

"They shall have power * * * to regulate and fix the rents or rates of water, gas and electric light or power; * * * and these powers shall not be abridged by ordinance, resolution or contract."

Section 725, as it appears in the Supplement of 1913, does not differ in these particulars.

Hence it will appear that the history of the statutory provisions with reference to the granting

of franchises, the regulation and fixing of rates, and the prohibition of any manner of abridgment of the powers to regulate and fix, not only disprove the assertion that the legislature intended to deprive cities of the power to contract, but conclusively prove that the powers to regulate and fix rates should be **further and additional powers** than those then existing.

In Waterworks Co. vs. City of Creston, 101 Iowa, 687 reading from page 698, Par. V, the Supreme Court of Iowa, in 1897, said:

> "Appellant's next contention is that the contract is void, in that it attempts to exclude future regulation."

Section 1, Chapter 16, Acts Twenty-second General Assembly, confers upon cities power to regulate water rates, and to regulate and fix the charges for water meters, etc., and provides:

> "This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract whereby the above powers are abridged."

The ordinance grants to appellee the right to charge and collect, during the continuance of the privilege, from consumers, the rates specified, "or other rates that may be established by the grantees and approved by said council." By this ordinance the city council established the rates therein specified, and have not since established any other or different rates. It is not alleged nor shown that these rates are unreasonable, and they are, there-

fore, authorized, legal, and binding until other reasonable rates are fixed. That the city council may at any time, when these rates are found to be unreasonable, fix rates that are reasonable, we think cannot, in view of said chapter 16, well be doubted. It is insisted that because of the provision in the contract as to rates the contract should be declared void. The contract contemplates that a change may be made in the rates, and the law authorizes it. To sustain this contract is to permit the parties to go on under it, and enjoy just what each has contracted for, while to overthrow it would be to render practically valueless the large investment which appellee has made, and deprive appellant of just what it needs and has. Surely, every equitable consideration is against such result. What we have said disposes of appellant's contention that the rates, being for twenty-five years, are unreasonable."

In the foregoing case the Supreme Court of Iowa, in an opinion filed April 10, 1897, reviewed the history of the statute, which appellant now seeks to convince this Court would disclose an intent of the Legislature to eliminate the power to contract, and arrives at the opposite conclusion, in the following language:

> "In the Revision of 1860 (Section 1059), power was given to incorporated cities and towns to erect waterworks, and to charge consumers a sufficient amount to defray the expenses of conducting and repairing the waterworks, and for the creation of a sinking fund for the liquidation of the debt created in erecting the works. We do not find that, prior to

the enactment of said chapter 78, any other provision was made for providing or paying for water supply by cities and towns. Said chapter was, at least so far as we are now called upon to consider it, incorporated into the present Code, and we will refer to it as found in McClain's Annotated Code. In addition to the power conferred in section 615, "to protect the property of the incorporation and its inhabitants," power is given in section 639, to erect water, gas, and electric light works, when approved by a majority vote of the electors. Section 640 provides that "they shall have power to construct or authorize the construction of such works without their limits." Section 641 provides that when the right to build and create such works is granted to private individuals or incorporated companies, "such cities and towns are authorized and empowered to enter into a contract with the individual or company constructing such works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

The Ordinance, No. 128, was enacted by the defendant city, and accepted by the plaintiff company, in June, 1891.

In Des Moines vs. Waterworks Co., 95 Iowa, 348, the Supreme Court of Iowa, in an opinion filed October 1, 1895, said:

"Now, it may be that these propositions

are not conclusive as to the rights of the company, because they are in the nature of offers to compromise. But they are in exact line with the thought that the company has no right, by contract, ordinance, or resolution, to resist a lawful adjustment and regulation of the rates. The fact that the original ordinance granted an exclusive right to furnish water for forty years, as we have seen, is not a material question in the case. It will be time enough for the company to call upon the courts to protect it from an abridgment of a supposed contract or constitutional right when an attempt to deprive it of such right is made. Its contract with the city was that the rates should not be one unalterable standard for forty years. If such a contract had been made, it might admit of very serious doubt whether it could be sustained. By the census of 1870 the population of the city of Des Moines was about twelve thousand, in 1880 it was twenty-two thousand, and it is now a city of about sixty thousand inhabitants. A contract binding the city to the initial rate for forty years from 1871, and up to the year 1911, might, and probably would, be held to be so unconscionable and unreasonable that it could not be enforced."

And on page 362 of the same opinion the court said:

"It will be observed, from what we have stated, that we concur in these propositions of counsel, and we must decline to determine questions which the cases do not present; and we are

thereby relieved of the examination and citation of a large number of adjudged cases upon the scope of the powers of incorporated cities and towns, in reference to the reasonableness of contracts of this character. There is no doubt of the power of the state to regulate the compensation to be paid to corporations in the exercise of a public service or employment, in the absence of any schedule of prices fixed by an arrangement in the nature of a contract."

In Ind. Dist. vs. LeMars Light & Water Co., 131 Iowa, 14, the Supreme Court of Iowa, in an opinion filed June 7, 1906, said:

"The city of LæMars, a municipal corporation of the second class. On the 1st of Oct., 1888, the city passed an ordinance entitled, 'An ordinance to provide for supply of water for the inhabitants of Le Mars, Iowa, for domestic use, for fire protection, and for other purposes.' The ordinance gave to J. M. Dunn, his heirs and assigns, the exclusive right for the term of 25 years to use the streets, alleys, and public grounds of the city for the purpose of erecting and maintaining a system of waterworks. The ordinance provided for the acceptance of its conditions in writing within 30 days after its passage, and that when accepted, it should constitute a contract between the city and Dunn, his heirs, and assigns. The conditions of the ordinance were accepted in writing by Dunn within the time required thereby. * * * Section 15 of the ordinance is as follows, so far as it is material to the present inquiry: 'The

following shall be the maximum water rates to be charged annually by said grantee, his heirs or assigns, for the use of water until changed as hereinafter provided.' Following this is a long schedule. * * * Churches and schools were designated therein as free. At the time the ordinance was passed the plaintiff owned and used three school buildings which have ever since been furnished free water for drinking, cleaning, and heating purposes by Dunn and his successors. * * * * Under section 417 of the Code of 1873, the city of LeMars had the power to erect waterworks itself, or to authorize the erection of the same by a person or corporation. Section 473 provided: (Then follows a quotation already quoted in this argument, page 24.)

This statute gave the city of LeMars the right to contract not only for water for municipal purposes, but for the rate which should be charged other consumers thereof. The express power thus granted was to be exercised by the city in the interests and for the benefit of the inhabitants of the city who might wish to become patrons of a water plant erected by an individual or a corporation, and included within its purview all consumers, whether such consumers might be individuals or corporations, secular or religious. That the ordinance and its acceptance by Dunn constituted a contract binding him and the city, as stated therein, cannot be successfully questioned."

And on page 19 of the same opinion the Court said:

"It is further contended that there is no privity of contract between the parties and therefore that the plaintiff has no right to maintain this action. If this be true, it is plain that no inhabitant of the city may maintain an action to compel a private water company to comply with its contract with the city to furnish the inhabitants thereof water for domestic purposes, and we do not think that such a rule can possibly obtain. The statute granting the city power to authorize private persons or corporations to construct waterworks and giving the city power to fix the rates by contract, impliedly, at least, makes every consumer of water thereunder privy to the contract to such an extent as to enable him to enforce his rights under the contract."

And on page 20 of the same opinion the Court said:

"The constitutional questions raised by the answer have been argued with much earnestness but we are unable to see how they affect this case. If the city were now attempting to establish the rate contended for by the appellant, there would be force in the appellee's several points, but such is not the present case. The contract entered into by the city and Dunn was one they both might lawfully make, and having made it, both parties and their privies are bound thereby. The plaintiff asks nothing more than the enforcement of a legal contract, and this we think it entitled to on both reason and authority."

In Iowa Railway & Light Company vs. Jones Auto Company, 182 Iowa, 982, one of Mr. Reed's own cases, decided by the Supreme Court of Iowa, October 25, 1917, the Supreme Court of Iowa, referring to Section 725 of the Code Supplement, 1913, said:

> "This statute authorizes the city council to fix the compensation for services to be rendered; but, in the absence of its exercise **or of any contract**, the company furnishing the service may fix and demand reasonable compensation for such service. Here the rate is defined by the terms of the franchise granted, which is in the nature of a contract between the company and the municipality; and the vital issue to be determined is whether, in agreeing that it was not to exceed the compensation stated, meter rents were actually or impliedly excluded."

And on page 990 of the same opinion the Court said:

> "The franchise granted by said ordinance was subject to the power reserved in the city council 'to regulate and fix the rent or rate for * * * heat,' and this might not be 'abridged by ordinance, resolution or contract.' Or, as is often said, the statute necessarily is read into the franchise and forms a part of it. Appellant expresses some doubt as to the meaning of the clause last quoted. Its manifest purpose is to forestall any attempt, by ordinance or resolution of the city, or through any contract, to permanently or for any specified

time fix the compensation for services rendered or material furnished. Whatever may have been the ordinances of the city in granting a franchise, or independent thereof, or resolution of the city council, or contract with the city or private parties, the power is continued in the city council to regulate and fix the rates of compensation thereafter to be exacted. The power is a continuing one, and one city council may not tie up its successors by anything it may do in the matter covered by this statute. The granting of such a franchise is by the city council, even though its approval by the electors of the municipality is essential to its validity. Section 776. **And the rates for service therein specified are subject to subsequent adjustment as this may be deemed expedient or necessary by the city council.**"

The foregoing was recognized as the law of Iowa by its Supreme Court in February, 1918, and now appellant contends that because the city council did not deem it **expedient or necessary to raise the rates** specified in the franchise ordinance, that appellant's property is being confiscated by the city. Appellant lays great stress upon what was said in Town of Woodward vs. Iowa Railway & Light Co., 178 N. W. 549. An examination of that case will show that it was a case wherein it was sought to specifically enforce performance of the contract, and not a case wherein the gas company attempted to restrain the city, the members of the council, and the consumers of gas, from interfering with the collection of such a rate as the gas company proposed to collect regardless of the action or

lack of action on the part of the city council as the council may have deemed expedient or necessary.

We will admit that there is language used in that opinion as follows:

> "By chapter 16, Acts 22nd G. A., this right of contract by the city council was taken away from cities having a population of 7000 or more, but was still permitted to cities of lesser population. By the revision and codification of 1897, the right of contract as to rates for utilities of this character was entirely eliminated, and the legislative power to regulate rates was conferred upon the city council in all cases."

We submit, however, that this statement is entirely unsupported by the history of, and the acts, and statutes, in question, and the decisions of the Iowa Supreme Court, and those of the Federal Courts. And we also submit that by the express terms of the statutes in question, the power to regulate and fix rates was an **additional power**, "in addition to the powers now granted, they shall have the further and additional powers conferred by this act," being the exact language used by the chapter referred to.

Nowhere can be found any language capable of being construed, or misconstrued, into a prohibition against fixing rates by contract, in the first instance. Indeed the statute, Section 725, recognizes three methods, but prohibits any **abridgment** of the powers to regulate and fix other rates when, as said in Jones Auto Co. case, "subsequent adjustment * * *

be deemed expedient or necessary by the city council."

In State vs. Public Service Commission, 172 Pac. 890, reading from the last paragraph of the opinion, on page 894, the Supreme Court of Washington said:

> "It is doubtless true that the Public Service Commission Law is remedial legislation, and should be given a liberal construction for the purpose of carrying out the will of the Legislature, as was pointed out in State ex rel R. R. Com. vs. Great N. R. Co., 68 Wash. 257, 123 Pac. 8; but the rule authorizing a liberal construction does not mean that the court shall write conditions or provisos into the statute where the Legislature has placed none, or write out of the act a section which the Legislature has placed there, when the various sections are not in irreconcilable conflict and may be harmonized."

In Ottumwa Railway & Light Co. vs. City of Ottumwa, 173 N. W. 270, Justice Salinger, on page 273, says:

> "The only remaining question is whether the illustration holds good in fact — whether such a statute as has been illustrated with has been in fact passed. We think that section 725 of the Code of 1897 is such a statute. That part of it which enacts that the power to regulate and fix rents and rates 'shall not be abridged by ordinance, resolution or contract' was, in effect, in existence as early as July 4,

1888, when chapter 16 of the 22nd G. A. became effective.' It is true chapter 16 does not contain said prohibition of section 725 in haec verba. But its language is, in effect, that of the prohibition found in the later statute. And on the revision of the Code it was evidently thought that the words in question found in section 725 were a substantial re-enactment of the provisions of said chapter 16, and, as said, we think that that is so."

Much stress is laid upon the duty of this Court to follow decisions of the state courts construing their own statutes. From a review of the decisions of the Supreme Court of Iowa, and of the statutes in question, and their history, we think this Court will find nothing in them requiring any such construction as contended for by appellant.

Justice Salinger, in the Ottumwa Railway & Light case, reading from 173 N. W. on page 272, says:

"It (The Supreme Court of the United States) has always held that if, in reason, there was a doubt whether statute authority to make such a contract had been conferred, and the highest court of the state has held that the power had or had not been conferred, it would, while reserving its right to independent decision, be strongly inclined to follow such pronouncement of such state court."

In Douglas vs. Kentucky, 168 U. S. 488, this Court said:

"The Federal Courts will lean towards an

agreement of views with the state courts if the question seems to them balanced with doubt."

It would seem, from a casual reading of some dicta in some opinions written by some members of the Iowa Supreme Court since the decision of Judge Wade in this cause, that an attempt was being made to forestall the decision of this Court in this case and other like cases, but we submit that the previous decisions of the Iowa Supreme Court and the statutes themselves do not leave any such matter of local state importance, so balanced with doubt. Neither is there any such clear present decision of the state court, as to preclude this court from deciding this cause upon the law generally as it may determine it to be.

In Birmingham Waterworks Co. vs. City of Birmingham, 211 Fed. reading from page 500, we find this statement:

> "Where state legislation is assailed in the Federal courts, as impairing the obligation of contract in violation of section 10, article 1 of the Constitution of the United States, the determination by the state courts that there is no conractual right to be impaired is not conclusive upon the federal courts. The federal courts determine for themselves whether contractual rights exist and are impaired by the subsequent legislation. A contrary rule would render this provision of the Constitution ineffectual, since it would be in the power of the state courts to render it inapplicable in any case by determination that no contract right existed to be impaired.

However, when the state courts' construction **upholds** the existence of contract rights, **instead of denying** them, no such reason exists for not following the state decisions. The charter power of a municipal corporation under the laws of the state creating it is a matter for the state courts to determine, and the federal courts will follow their construction unless it conflicts with proper enforcement of a right under the laws of the United States.

In the case of Vicksburg vs. Vicksburg Water Co., 206 U. S. 496-509, 27 Sup. Ct. 762, 766 (51 L. Ed. 1155), the Supreme Court of the United States said in a similar case to this one:

> 'In the cases generally in this court it will be found that, in determining the matter of contract, the local decisions have been given much weight, and ordinarily followed. As this is a Mississippi contract, and the power was exercised under an act of the Legislature of that state, we naturally took to the decisions of the courts of that state, particularly to such as had given construction to similar charters **at the time the contract was made**, with a view to determining the extent of the power conferred.'

Under this principle, the Alabama decisions reflecting on the power of the city to enter into the contract of June 2, 1888, should be controlling, when they **upheld** the power of the city to make the contract."

This opinion was reviewed and approved by the Circuit Court of Appeals April 18, 1914, reported in 213 Fed. 450.

In City of Council Bluffs vs. Waterman, 86 Iowa, 688, reading from page 691, the Supreme Court of Iowa, said:

> "It is our duty to so construe these statutes as that all may stand and have effect, if possible, unless they are clearly in conflict, or the latter unmistakably or by express reference repeals the former."

In Phillips vs. City of Council Bluffs, 63 Iowa, 576, reading from page 578, the Supreme Court of Iowa, said:

> "But in 1876, the general assembly passed an act entitled 'An act relating to cities organized and existing under special charters, conferring additional powers, and amending the charters of such cities.' See Miller's Code, pages 141-146. Sections 8, 9 and 10 of the statute are substantially the same as section 469 of the Code, except that the provision in relation to the payment or tender of the damages is omitted. Does this last statute repeal by implication section 469 of the Code, as to cities acting under special charters? There is no express repeal of any prior or existing statute. Why the latter was enacted while the former was in force is a problem we are unable to solve, unless the provision above quoted, as forming a portion of section 479 of the Code, was overlooked. Be this as it may, we think, as both statutes may be enforced, and there is no inconsistency in their provisions, that both should be permitted to stand. All that can be

said is that they are substantially the same, but that section 469 of the Code contains a provision that is not found in the last statute enacted."

In this connection we desire to call the Court's attention to the fact that in enacting chapter 16 of the 22nd G. A. the legislature expressly provided that the power to regulate and fix rates, should be a further and additional power, "in addition to the powers now granted." While in the Code of 1897 these particulars were not inserted in section 725 of the Code of 1897, which was a substantial re-enactment of section 725 of McClain's Code, which did contain these explanatory words.

We therefore contend that the Supreme Court of Iowa is not at liberty to, and cannot without doing violence to the English language, say that there is either any express or implied repeal of the power to fix rates by contract, which is admitted to have existed prior to the passage of Section 725 of the Code of 1897. Especially in view of the fact that by the express language of Section 725 of McClain's Code the powers therein granted were to be "further and additional powers," "in addition to the powers now granted."

In Diver vs. Savings Bank, 126 Iowa, 691, Judge Deemer, writing the opinion of the Court, said: (Reading from page 696):

"There was no express repeal of any section of the Code, and, if there be a repeal, it must be held to result from implication. Such repeals are not favored in law; and when two statutes cover, in whole or in part, the same

matter, and are not absolutely irreconcilable, no purpose of repeal being clearly expressed or indicated, it is the duty of a court, if possible, to give effect to both. It will not be presumed that the legislature intended a repeal of a prior statute by a later one on the same subject, unless the last statute is so broad in its terms, and so clear and explicit in its words, as to show that it was intended to cover the whole subject, and therefore to displace the prior statute."

In Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655, this Court said:

"The supposed contract arises from a term in the ordinance under which the plaintiff was granted a renewal of its franchise in 1896. By Sec. 3, 'In consideration of the privileges herein granted to said company it shall furnish to the inhabitants of said city gas for lighting at a price not to exceed $1.80 per thousand feet, and 20 cents per thousand cubic feet discount if consumers pay on or before the 10th of each month after consumption,' etc. It is admitted that under the laws of Iowa the rate could be changed by the city, but it is argued that the quoted words import a contract that it shall not be changed to such an extent as to make impossible the offer of a discount for prompt payment,—that being the cheapest and most efficient way of collecting the price of the gas. The state court assumed that there was no contract in the case, and in discussing what it treated as the sole question, whether the plain-

tiff would be deprived of a fair compensation for its services, pointed out that the company could secure payment by requiring a deposit in advance or by making other reasonable rules.

"We are of the opinion that there was no contract on the part of the city that the price should be kept high enough to allow a discount for prompt payment. The general power reserved to regulate rates was limited only by the 14th Amendment. The words relied upon by the plaintiff express its promise in consideration of the privileges granted—not a promise by the city. Knoxville Water Co. vs. Knoxville, 189 U. S. 434, 437, 47 L. Ed. 887, 23 Sup. Ct. Rep. 531. It is true that the contract was in the form of an ordinance, but the ordinance was drawn as a contract, to be accepted, and it was accepted by the plaintiff; it contained reciprocal undertakings, the one in question being that of the plaintiff, as we have said; and it was subject to the power retained by the city to regulate rates. That power, it was expressly provided by the Iowa statute, was not to be abridged by ordinance, resolution, or contract. Code of 1897, Sec. 725, 22d G. A. (1888) Chapter 16."

In Knoxville Water Co. vs. Knoxville, 189 U. S. 434, last above cited, this Court said:

"The Water company was incorporated in Tennessee in 1882 to construct waterworks in or near Knoxville, with power to contract with the city and inhabitants for the supply of water, and to 'charge such prices for the same

as may be agreed upon between said company and said parties.' This incorporation was under a general act which provides as follows: 'And this (act) is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company.' Acts of 1877, Chap. 104, Sec. 2. In the same year, 1882, the company made a contract with the city by which it agreed to construct its works and to furnish water, the city gave the company exclusive privileges for thirty years and agreed to make certain payments, etc., and it was mutually agreed, among other things, that, after fifteen years, the city council have the right to purchase the works at a price to be fixed by appraisers if not agreed upon. The contract contained three distinct parts: First, the promises of the company; next, those of the city; and last, the mutual undertakings. In the first part the company undertook as follows: 'Said company will supply private consumers with water at a rate not to exceed 5 cents per 100 gallons,' subject to an immaterial proviso. These are the words relied on by the company. They are assumed to contain an implied undertaking on the part of the city not to interfere with the company in establishing rates within the contract limits.

"After the contract was made the company built its works and furnished water. Later it took over contracts between two other concerns and neighboring towns and consolidated

with one of the other concerns, which was a corporation. The towns, on their side, were made a part of Knoxville; and the whole water supply was brought under the original contract. But these facts do not alter or affect the present case, and need not be stated in detail. The company went on furnishing water and charging rates within the contract limit, to the satisfaction of the city, it may be assumed, until within a year or two, when the city passed an ordinance which cuts down the rates which the company had been charging and asserts its right to charge.

"The trouble at the bottom of the company's case is that the supposed contract on which it is founded does not exist. If such a contract had been intended, it was far too important to be left to implication. In form the words are words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See Georgia R. & Bkg. Co. vs. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Ragan vs. Aiken, 9 Lea, 609, 42 Am. Rep. 684. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city 'by ordinance to regulate the price of water' which the company might supply. People who have accepted, as experience shows that people will accept, a charter subject to such liabilities, cannot complain of them or repudiate them, nor can the company which they have formed.

Rockport Water Co. vs. Rockport, 161 Mass. 279, 37 N. E. 168. This consideration answers a portion of the company's argument as to its rights under the 14th Amendment, and makes it unnecessary to consider whether the regulation of water rates is properly to be classed as a police power. It also reinforces our interpretation of the instrument upon which the company founds its claim.

"We do not mean that under other circumstances words which on their face only express a limit might not embody a contract more extensive than their literal meaning. Detroit vs. Detroit Citizens' R. Co., 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410. But in that case the rate was fixed by an ordinance which was the language of the city, the ordinance was under a statute which declared that the rates should be established by agreement between the city and the railway company, and neither statute nor ordinance reserved a power to the city to alter rates. In the present case it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law under which the water company was created. It would require stronger words than those used here to raise the question whether, under the statutes in force, the city could do it if it had tried. The contracts fixing prices authorized by the statute were contracts between the company and its customers, not, as in the case of the railway company, a single contract between the com-

pany and the city, and were subject to the power to regulate them given to the city by the same statute. We assume that the charter of the city authorized it to contract, but it was not so specific as the statute which we have quoted, and added nothing to the power conferred by that law. * * * *

"Some argument was attempted as to the ordinance impairing the obligation of the contracts between the company and its consumers. But such contracts, of course, were made by it subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts. * * * The contracts recognize the possibility of change, as the agreement is to pay for the water in accordance with the rates 'now or hereafter in force.'"

In Ft. Smith Light & Traction Co. vs. City of Ft. Smith, 202 Fed. 581, the Court said:

"It is alleged in the complaint that the plaintiff is selling natural gas in Ft. Smith under Ordinance No. 634, passed December 21, 1903, and that said ordinance provides that the price charged for natural gas should not exceed the sum of $1 per thousand cubic feet. It is contended by the plaintiff that this provision for a maximum rate of $1, together with certain other provisions in the ordinance requiring the grantee of the franchise, and his successors, to furnish gas free to certain public buildings, constitutes a contract which prevents the city from making a lower maximum

than $1. This contention is not good for three reasons:

(1) "The city by the ordinance did not undertake to surrender any right or power it had. On the other hand, the grantee of the franchise in accepting the ordinance undertook to sell natural gas at a price not to exceed one dollar per thousand cubic feet, regardless of conditions. With reference to fixing the price of gas the ordinance was a limitation on the grantee of the franchise, and not upon the city. Knoxville Water Co. vs. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887.

(2) "The law giving municipalities the power to fix rates was in force at the time of the passage of the ordinance in December, 1903. It therefore became a part of the contract between the city and the plaintiff as the successor of the original grantee of the franchise. Arkadelphia Electric Light Co. vs. Arkadelphia, 99 Ark. 178-186, 137 S. W. 1093.

(3) "The city could not by contract divest itself of the power conferred upon it by the legislature. Cedar Rapids Gas Co. vs. Cedar Rapids, 223 U. S. 655."

The action in the foregoing case was an application for a temporary restraining order to restrain the city of Ft. Smith and its mayor, police judge, and city attorney from enforcing Ordinance No. 1053, passed by the council of the city of Ft. Smith on the 16th day of December, 1912, in which the maximum price at which natural gas may be sold to consumers in said city is fixed at 25 cents per thousand cubic feet. This ordinance was not

the franchise ordinance, was never accepted by the gas company, was a legislative act of the city council purely, and was confiscatory in fact, if the rate as so reduced was not compensatory.

The distinction between such a case and the one at bar is well pointed out in the recent case of City of Moorhead vs. Union Light, Heat & Power Co., 255 Fed. 920, in which the District Court of the United States for the District of Minnesota, in an opinion filed October 26, 1918, said:

> "It is easy to confuse this case with the cases which have usually been brought before courts by utility companies. Such companies usually come into court upon the following state of facts: They have received a franchise from the city, fixing the rate for their service. At a subsequent date the city in the exercise of its police power reduces those rates, and the company then asserts that the new rates are confiscatory; that is, so low as not to yield a reasonable profit upon the value of the property devoted to the service. As against all such reductions, the company is protected by the Fourteenth Amendment of the Constitution against rates being made so low as not to pay a reasonable profit. Such, however, is not the present case. Here there has been no reduction by the city of the franchise rates. It simply stands upon its contract and asks protection against the rates being raised by the company. The party who is changing the franchise rates now is, not the city, but the utility, and the city is only asking the court to compel the company to perform its contract and furnish gas at the

rates for which the company has agreed to be bound.

"It is conceded in argument that the rule in the federal courts in actions at law is that a party is bound by his contract, though performance results in loss. This is settled by the Court of Appeals of this circuit in the recent case of Berg vs. Erickson, 234 Fed. 817, 148 C. C. A. 415, L. R. A. 1917A, 648. From a careful review of the authorities, Judge Sanborn there states that in some of the state courts a rule has been developed that, when conditions arise of such a character that the court can say that they were not within the contemplation of the parties at the time the contract was made, such a change of situation will excuse a violation of the contract. He concludes, however, as follows: 'But no decision of the Supreme Court or of any federal court to this effect has been cited or discovered which goes so far, and the rule adopted by the Supreme Court, which must prevail here, is otherwise.'

"He cites many federal authorities in support of the strict rule. Among them are Dermott vs. Jones, 2 Wall. 1, 17 L. Ed. 762; The Harriman, 9 Wall. 161, 172, 173, 19 L. Ed. 629; Jones vs. United States, 96 U. S. 24, 29, 24 L. Ed. 644; Chicago, Etc., Ry. Co. vs. Hoyt, 149 U. S. 1, 14, 15, 13 Sup. Ct. 779, 37 L. Ed. 625.

"Conceding this to be the rule at law, counsel for defendants insist that the rule in equity is different, and that a court of equity will not specifically enforce a contract when a change in the situation has occurred of such a character that the parties at the time of mak-

ing the contract did not have it in contemplation. Controlling decisions of the federal courts, however, are also fatal to this contention. The question has been directly passed upon, and contracts much more inequitable than the one here involved were enforced in the following cases: Marble Co. vs. Ripley, 10 Wall. 339, 19 L. Ed. 955; Franklin Telegraph Co. vs. Harrison, 145 U. S. 459, 471, 12 Sup. Ct. 900, 36 L. Ed. 776; Guffey vs. Smith, 237 U. S. 101, 115, 35 Sup. Ct. 526, 59 L. Ed. 856. These cases all decide that in determining whether equitable relief should be granted with respect to a contract the court must place itself in the position occupied by the parties at the time the contract was made, and not at the time at which it is to be performed. If at the time it was made the contract was fair and free from fraud, mistake, or imposition, parties must be left free to make their contracts, and it is the duty of courts to enforce them as made. The same doctrine has been applied to contracts between municipalities and public utility companies. Logansport, etc., Gas Co. vs. Peru (C. C.) 89 Fed. 185; Muncie Natural Gas Co. vs. Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; Westfield Gas & Mining Co. vs. Mendenhall, 142 Ind. 538, 41 N. E. 1033; Pond on Public Utilities, Secs. 431, 432.

"The contract between plaintiff and defendant is for a comparatively short term. The conditions which cause the hardship are not permanent, and are certainly not greater than those which frequently arise in contracts between private corporations and individuals. In

the case of In re Janvrin, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319, Mr. Justice Holmes, speaking for the Supreme Court of Massachusetts, held that contracts between public utilities companies and corporations for a brief term, so as to give both parties peace and an established status, were reasonable, and when so made should be enforced by the courts."

Again in the same opinion Judge Amidon says:

"It is finally urged that the franchise is not mandatory but permissive, and that the company has a right at any time to withdraw from performance when performance will entail an actual loss. There are numerous decisions which have held that street railway companies may withdraw their service from a limited section under the circumstances named. My attention has not been called to any case authorizing a public utility company to withdraw from supplying an entire city with a commodity like gas or electricity. I shall not attempt to determine at this time whether defendant possesses such a right. * * The situation disclosed by the cross-bill, if it is a true picture of the actual effect of the rates upon defendant's business, is such as might lead a just man in private life to modify a contract. It is within the power of the city council to modify a contract. In states having a public utility commission vested with full authority to deal with the subject of rates, such, for example, as Massachusetts, New York, Wisconsin, and California, those commissions have exercised their powers to increase rates when

they were unreasonably low just as freely as to reduce them when they were unreasonably high. Unfortunately there is no commission in the state of Minnesota clothed with such a power. The same is true in North Dakota. A commission which is powerless to protect the public is also powerless to protect the company. Relief against such a situation, however, can be found only in the legislature, and will not justify courts in assuming legislative powers."

In the foregoing case the situation was practically the same as in the case at bar. On the 6th day of May, 1912, an ordinance granting the defendant a franchise for the purpose of distributing gas for the term of ten years, was adopted by a majority of the voters of the city. It was accepted in writing on August 22d. Section 6 of this ordinance fixes the maximum price of gas at not to exceed $1.80 per thousand cubic feet for illuminating, and $1.45 for fuel purposes. Defendant has since been supplying gas to the city and its inhabitants under this franchise at the rates agreed upon. Aug. 22, 1918, defendant served upon the city of Moorhead written notice that the rates for gas for all purposes from and after September 1st would be $2 per thousand feet. The only material difference between the Moorhead case and the case at bar is that in that case the action was brought by the city to restrain the violation of the ordinance, and in the case at bar the action was brought by the utility company to restrain the city, the members of the city council, and the consumers and patrons, from interfering with the collection of the utility company's self-imposed raise in rates. Thus making the case at

bar a stronger case against the utility company, in that they are not simply seeking to avoid the performance of the ordinance contract, but they are seeking to hold what they desire of the benefits of the ordinance contract, and repudiate only the condition upon which they secured the privileges obtained under the ordinance.

If the utility company in the case at bar were only seeking to avoid specific performance of the ordinance contract, and were willing to treat it as void, the City of Fairfield, the members of the city council, and the consumers of gas, would be perfectly willing to accede to such a solution of the matter. In fact they would be pleased to treat the contract as forfeited, which we believe they would have a right to do unless the utility company complies with the conditions upon which they secured the franchise, the most important of which conditions was the matter of rates to be charged for the first three years, the increased cost of production being at that time already in effect. In fact the service rendered since the proposed increase in rates, and more especially after the expiration of the three-year period, when the city council did increase the rates to $2.25 per thousand cubic feet, on promise of the company to give better service, has been so poor and inefficient that the city and the patrons generally would be pleased to consider the franchise void as a whole, and make other provisions for their needs.

In Trustees of Saratoga Springs vs. Saratoga Gas, E. L. & P. Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713, we find this statement:

"We now reach, however, a provision of the statute which, in our judgment, necessarily renders it invalid. The statute enacts that 'the price so fixed by the commission shall be the maximum price to be charged by such person or corporation for gas or electricity in such municipality for a term of three years, and, until after the expiration of such term, such commission, upon complaint as provided in this section, again fix the price of gas or electricity.' (Laws 1905, Chap. 737, Sec. 17). We have no difficulty in upholding the provision that the rate shall remain as established for the term of three years. It is urged that the circumstances might so alter that before the expiration of three years a rate which was reasonable at the time it was established would become unreasonable. This is possible. Nevertheless, we think the legislature was justified in enacting some period of repose during which the rate should remain stable. In answer to this objection, we cannot do better than quote the reply made by Chief Justice Holmes to a similar objection in the Massachusetts case cited Re Janvrin. He said: 'But, supposing a party aggrieved should obtain an injunction, obviously the decree would be drawn so as to bind the defendant for a reasonable time, or, if it were drawn in the common form, subject to review on a change of circumstances, the court would not be likely to grant leave to file a bill of review until a reasonable time had elapsed; and, if the legislature should say that in these cases five years was a reasonable time, we could not say that it was wrong.'

"The real difficulty with the provision of the statute is that the rate fixed by the commission is to continue, not only for three years, but indefinitely thereafter, until fixed anew on complaint, as provided by the statute. But, by the terms of the statute, the only persons authorized to make complaint are certain municipal officers, or 100 or more customers or purchasers of gas or electricity. No opportunity or right is given to the corporation to apply, at the end of three years, or at any time thereafter, for a new adjustment of the rates. That right is limited solely to the municipal officials or consumers." . . . . . .

"It seems to us that this is a real case violating the inhibition of the 14th Amendment of the Federal Constitution."

Now, we quote the above for the reason that it is the doctrine there stated and illustrated that gives rise to appellant's contention of lack of mutuality.

If the city council were prohibited by statute from acting when appellant filed its application for a raise in rates, then this doctrine of equal protection of the laws" would be applicable. But it would be that clause of the Constitution that would be violated, and not a case of lack of mutuality of contract.

However, in the case at bar, the appellant had the same right to apply for a raise that the consumers had to apply to have the rates reduced, and the city council had the same power to raise rates as they had to reduce them.

The fact that the city council does not see fit to act, or in other words, does not deem it expedient or necessary to act at any particular time, does not inject into the matter any lack of mutuality, or violation of the equal protection clause of the Constitution.

It will be noted that the above case was a statute under consideration, and not a case where the objectional clause had been accepted and agreed to as one of the conditions upon which the franchise was received.

In State ex rel Webster vs. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C page 287, we find this statement:

> "The same question now confronting us was before the Supreme Court of Wisconsin. A city had granted permission to a railway company to run interurban cars over and along its streets. One of the conditions upon which the right was given was that the fare to be charged between the two cities should not exceed 10 cents for a single trip during the life of the franchise, which was thirty-five years. The franchise was accepted and acted upon. Thereafter the company to which the franchise had been assigned announced that the rate would be increased to fifteen cents. The city brought suit to prevent the increase in fares, and to compel the company to abide by its contract. The company set up as defenses that the city had no power to exact the condition that the ordinance, in so far as it related to interurban fares, was ultra vires; that the ordinance had been superseded and repealed by subse-

quent legislative action; that a fare of 10 cents was not compensatory; and that one of 15 cents was reasonable. The trial court found that a 10-cent fare was not compensatory, and that a 15-cent fare was reasonable, but that the company was bound by the terms of the ordinance, and enjoined it from raising the rate. The Supreme court reduced the questions involved to three: (1) Did the parties have the power to make a contract? (2) If so, to what extent is it binding and enforceable? (3) Had it been lawfully superseded or nullified? And now, adopting the language of the court: (1) 'That the traction company had the right on its part to make a contract fixing the rate of charge for a given service, provided such contract violated no law, and was not inimical to public policy, is clear enough. By so doing it could not forestall the state, and prevent it from exercising its governmental function regulating rates. But, until the state sees fit to interpose, the carrier ordinarily may exercise a free hand in fixing rates, subject to the qualification that they must not be unreasonably high and must not be unjustly discriminatory . . . . There was no law inhibiting the making of the contract involved, at the time it was entered into, and there is nothing to show that it was discriminatory or against public policy. . . . . .

"'We therefore hold that the parties were competent to make the contract entered into.' (2) It was held that no special authority had been conferred on the city to enter into the contract, and 'the contract remained valid be-

tween the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation.' "

Again, in the same opinion, we find this statement:

"The Railroad Commission has made no determination in the case before us; at least, if it has, it is no part of the record. Until that determination is made, the contract is in force. When it is made, the contract is superseded, **if the rate is changed.** The Commission has ample authority to proceed upon its own motion. The traction company, under subdivision 'e' of Sec. 12, has power to make the necessary complaint to compel investigation. This works no hardship on anyone. It may be, as the trial court found, that a 10-cent fare is unreasonable, and that a 15-cent fare is not so. Usually, long-time contracts made under like conditions operate against the public interest, and, if the fare provided for is unreasonably low, the legislature has the same power over it that it would have if it were unreasonably high. It may also be that adequate service cannot be given at the rate fixed, or that conditions have so changed that the road cannot be operated unless rates are increased, and that the public will be better served by raising the rate than by permitting it to remain where it is. This is a question which calls for the exercise of legislative policy and discretion. The court cannot relieve the defendant from an improvident con-

tract, but the contract is of such a character in the present instance that the legislative branch of the government may, in the interest of the public, abrogate it.' Manitowoc vs. Manitowoc & N. Traction Co., 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925. The same principles are affirmed in Home Teleph. Co. vs. Los Angeles, 211 U. S. 271, 53 L. Ed. 181, 29 Sup. Ct. Rep. 50, and Dawson vs. Dawson Teleph. Co., 137 Ga. 62, 72 S. E. 508."

In Turtle Creek Borough vs. Pennsylvania Water Co., 90 Atl. 199, the court said:

"The main contention of appellants is that the ordinances created a contract relation between the parties, or at least between some of them, which limited for all time the rates to be charged by the water company. The ordinance of the borough of Turtle Creek, passed in 1895, contains the following provision: 'The rates charged by said company for water furnished for domestic purposes, by contract or by meter measurement, shall not exceed the rates charged for the same service by the city of Pittsburgh.' The ordinance does not contain any definite schedule of rates, nor is it limited as to time. Upon this question the learned court below, inter alia, said: 'On the contention that there exists a contract between the defendant and these several plaintiffs at the time the franchise was granted and permission given to enter into the borough, it is sufficient to say that where these contracts are for a definite period, they are binding; neither party

can receive the benefits therefrom and at its will repudiate the conditions entered into originally. But where the contracts have expired, or where they seem to be indeterminate, they are revocable on notice, under changed conditions.' To sustain this position the court cites the very recent case of McCollough-Dalzell Crucible Company vs. Philadelphia Co., 223 Pa. 336, 72 Atl. 633. The great weight of authority everywhere sustains the view of the court; indeed this view is based upon a very conservative statement of the law in such cases. In a number of jurisdictions it has been held that it is against public policy for private parties to enter into contracts with public service corporations fixing rates to be charged either for a definite or an indefinite term of years **so as to preclude judicial inquiry**, or investigation by other tribunals constituted for the purpose, into the question of the reasonableness of such rates. We have not gone so far in Pennsylvania, but have uniformly upheld contracts of this kind for fixed and definite periods."

We wish to call the Court's attention at this time to the fact that the appellant, Iowa Electric Company, does not, in its Bill of Complaint, claim that Ordinance 192 was intended to fix an unchangeable rate, but, the Bill uses the following language:

"Your orator further says that Ordinance No. 192 of said city of Fairfield, fixes maximum rates which may be charged for gas service rendered to the said town and its inhabitants as follows:" etc. (See Record Page 5).

In Smittle vs. Haag, 140 Iowa, 492, the Supreme Court of Iowa said:

> "Having clearly elected to his own benefit to treat the statute as constitutional, and the proceedings thereunder as valid, they will be deemed valid as to him, and the court will not inquire into the constitutionality of the statute. This point was ruled by this court in Thompson vs. Mitchell, 133 Iowa, 527."

In Railroad Company vs. Railway Company, 123 Iowa, 543, the Supreme Court of Iowa said:

> "A part of appellee's argument is devoted to a discussion of the constitutionality of the statute in question, but we do not deem it necessary to enter this field. It is conceded that the interlock is for the exclusive benefit of the old company, and is not a police regulation for the protection of the public. If this be true, it follows that the old company may or may not invoke the aid of the statute for the protection of its financial interests. If it does not demand the interlock, it must then obey the police statute, which requires trains to stop for grade crossings. Code, Sec. 2073. It may take its choice, but if it elects to require the crossing company to install an interlock, and thus invokes the protection of the statute, it cannot question the constitutionality of the terms upon which it may have such aid and protection. If the conditions imposed by the statute are not satisfactory, the company is not bound to accept them, or to put the stat-

ute in operation; but if it avails itself of the provisions of the statute which are beneficial to it, good conscience and fairness demand that it shall make no attack upon the conditions which are imposed by the statute, and which are an inseparable part of it. Daniels vs. Tearney, 102 U. S. 421 (26 L. Ed. 187); Ferguson vs. Landram, 5 Bush, 230 (96 Am. Dec. 350); Lee vs. Tillotson, 24 Wend., 337 (35 Am. Dec. 624); Van Hook vs. Whitlock, 26 Wend., 43 (37 Am. Dec. 246)."

In Gano vs. Minneapolis, etc. R. R. Co., 114 Iowa, 713, 87 N. W. 714, 89 Am. St. Rep. 393, Deemer, J. speaking for the Supreme Court of Iowa, said:

"Among other things, it is said the statute is not uniform in its operation; that it grants land owners immunities from costs that are imposed on railway companies; that it discriminates in favor of one class of litigants and against another; that it is violative of the fourteenth amendment of the federal constitution, in that it deprives railway companies of their property without due process of law, and denies to such companies the equal protection of the law."

And again in the same opinion:

"The ready answer to all this is that all corporations coming within the purview of the act are given like privileges. Given equal privileges, they may not complain of the burdens imposed, provided they are imposed on

all entitled to use the privilege. The act is not, in our judgment, vulnerable to any of the limitations of either the state or federal constitutions. But if it were, we are not prepared to hold that defendant may take advantage of its invalidity. In Dow vs. Electric Co., 68 N. H. 59, 31 Atl. 22, the Supreme Court of New Hampshire said: 'When a legislative grant of authority to exercise the power of eminent domain contains a condition that the grantee shall pay more than the value of the property taken under the power, the grantee accepting the grant and exercising the power cannot question the constitutionality of the condition. The defendants are authorized to flow plaintiff's land upon the condition, among others, that they pay the damage thereby done to him, and fifty per cent in addition. . . . . the statute is permissive. It confers a privilege which the defendants were at liberty to exercise or not, as they saw fit. By their exercise of the power conferred, flowing the plaintiff's land, and applying for assessment and damages, they are precluded from denying the validity of the condition. The question of its constitutionality under either the federal or state constitution is not open to them; Pitkin vs. City of Springfield, 112 Mass. 509; Deverson vs. Eastern R. R. Co., 58 N. H. 129, and cases cited; Dodge vs. Stickney, 61 N. H. 607; People vs. Murray, 5 Hill, 468. The defendant's objection that the statute is in conflict with both constitutions or either of them is overruled.' This case was afterwards appealed to the Supreme Court of the United States, and that tribunal said: 'We

agree with the Supreme Court of New Hampshire in thinking that the plaintiff in error, by availing himself of the power conferred by the statute and joining in a trial for the assessment of damages, is precluded from denying the validity of that provision which prescribes that fifty per cent shall be added to the amount of the verdict. The act confers a privilege which the plaintiff in error was at liberty to exercise or not, as it saw fit': See Electric Co. vs. Dow, 166 U. S. 489, 17 Sup. Ct. Rep. 645."

In Grand Rapids and Indiana Railway Company vs. Osborn, the Supreme Court of the United States, reading from page 314 of 24 Sup. Ct. Rep. said:

"Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of the existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. Daniels vs. Tearney, 102 U. S. 415, 26 L. Ed. 187. That a railroad corporation may contract with a municipality or with a state to operate a railway at agreed rates of fare is unquestionable. And where the provisions of an accepted statute respecting rates to be charged for transportation are plain and unambiguous, and do not contravene public policy or positive rules of law, it is clear that a railroad company cannot avail of privileges which have been procured upon stipulated con-

ditions, and repudiate performance of the latter at will. Whether, if a condition in a statute is couched in ambiguous language, and is susceptible of two constructions, as is claimed in the case before us in respect to the basis upon which the gross receipts per mile of operated road was to be calculated, a construction should be adopted which will not render the condition repugnant to the Constitution of the United States, we need not determine. The statute in question, in its entirety, has been construed by the Supreme Court of Michigan, and held valid, and its decision as to the proper interpretation of the language of the act in respect to the mode of ascertaining the gross receipts per mile does not render the statute repugnant to the Constitution of the United States."

The foregoing case brings the question home to the case at bar. The language of the ordinance in question was not ambiguous or capable of but one construction. It plainly provided for specified rates to be charged for gas. And hence, having understandingly and voluntarily accepted the benefits of the franchise granted, Dows, Smith & Reed, and their assignees, the Iowa Electric Company, cannot repudiate the rate conditions and retain the beneficial conditions and privileges. It is estopped from repudiating the burdens.

In 12 Corpus Juris 769 we find the following:

"13. Estoppel or Waiver—a. In General. A person may, by his act, waive a right which

he might otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition. Thus a person who has participated in proceedings under a statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts right under it, may not question its constitutionality."

Certainly in the case at bar the Iowa Electric Company participated in proceedings under the Ordinance, 192, acted under it and in pursuance of the authority conferred by it, claimed the benefit of the ordinance to the detriment of others, and have asserted and are still asserting rights under it.

The position taken by the Iowa Electric Company seems to be that it can retain all of the rights, privileges, and benefits, obtained by the franchise ordinance and at the same time repudiate the vital condition upon which it secured such rights, privileges and benefits.

In fact the principal counsel for the plaintiff company, Mr. John A. Reed, was one of the original grantees of the franchise, and conducted the campaign personally in securing the passage of the ordinance in question, and its approval by the voters of the city of Fairfield, and knew of the increased cost of production at the time his company accepted the franchise. He afterwards explained to the city council that he at that time thought the

increased cost of production was only temporary, and claimed that it had lasted longer than he had anticipated. However, in presenting the matter to the federal court for an injunction he then claimed that he had always regarded to provision as to rates as illegal and ineffective, and believed he could repudiate that provision and get the rates raised without any danger of losing the franchise rights

We submit that to come into a court of equity with such a contention is most unreasonable, unfair, and unjust, and plaintiff cannot do so with clean hands.

This Court, and all courts, can readily appreciate the serious difficulties small cities would have in frequent contests as to whether or not the rates are producing a proper return on the capital invested in utility enterprises. All of the means of ascertaining the facts necessary to a proper solution of such a question are peculiarly within the knowledge and in the possession of the utility company, who, as in this case, give their property in for taxation purposes as being worth $50,000, and for the purpose fixing rates claim it to be worth $500,000. If the city is required to employ high priced engineers every time there is a fluctuation in the cost of production, and they cannot permit a rate to remain in the cost of production, and they cannot permit a rate to remain for so short a period as three years, when such time is fixed by the agreement of the utility company, as a condition upon which such utility company is permitted to use the streets, alleys, and public grounds of the city, then what becomes of the governmental power of the city council?

The Court will note from the provisions of the statutes of Iowa that under Section 720 cities "**may** also **grant** to individuals or private corporations the authority to erect and maintain such works or plants." No conditions are provided. No individual or corporation can compel such a grant. The provisions following, that they shall not be granted for more than twenty-five years, and that no such works or plants shall be authorized unless a majority of the legal electors vote in favor of the same, are a limitation upon the power to grant the franchise, and not a condition upon which any grant shall be made. In the nature of things this must be true, because such provisions are prohibitions against the grant, and not conditions. There could be no grant at all for more than twenty-five years, and none at all unless a majority of the voters favored the grant.

The express language of Section 725, which it is contended was intended by the legislature to take away an existing power to contract, or fix rates by contract, is permissive language. "They shall have power * * * and these **powers** shall not be **abridged.**"

This language is permissive language, it is language granting authority, and not language commanding or describing a duty. And, as appellant contends and we agree, it is language refering to a governmental function of the city council, to be exercised, as said by the Iowa Supreme Court in the Jones Auto case heretofore quoted from, "as this may be deemed expedient or necessary by the city council."

There is nothing in the language used in this statute, or any other statute, which either express-

ly, or by any reasonable construction impliedly, can be said to prohibit rates from being fixed by the agreement of the parties. In fact, the express language of the original act with reference to the grant of power to "regulate and fix rates," Chap. 16, 22d G. A., which Justice Salinger, in the Ottumwa Railway & Light Co. case, 173 N. W. on page 273, said, "on the revision of the Code it was evidently thought that the words in question found in section 725 were a substantial re-enactment of the provisions of said chapter 16, and as said we think that that is so," begins with the statement: "ADDITIONAL POWERS. 22d G. A., ch. 16, No. 1. All cities of the first class and cities of the second class having over seven thousand inhabitants and cities organized under special charters in this state in addition to the powers now granted, shall have the further and additional powers conferred by this act, as follows, towit:" Then follows the words in question. Nowhere in the act, or in any other act of the legislature, is there any language which, without absolute mis-construction, can be said to either expressly or by any manner of implication prohibit the fixing of rates by agreement.

There is a prohibition expressly stated in this statute, and that prohibition is that "these powers shall not be abridged by ordinance, resolution or contract." In the original chapter 16 referred to the language was: "This shall not be construed to authorize the passage of an ordinance or resolution **on** the making of any contract, whereby the above **powers** are **abridged**."

If appellant's contention that such provision prohibits the fixing of rates by **contract** be correct, then, by the same process of reasoning, it prohibits

the fixing of rates by **ordinance**, or by **resolution**. And if the city cannot fix rates by any of these methods, then in what manner can it fix rates?

The real truth of the matter is that there is no ambiguity in the language used. It means just what it says: The city can fix rates in any manner it sees fit, but in whatever manner rates are fixed, they shall be always open for re-adjustment, either up or down, "as this may be deemed expedient or necessary by the city council."

An analysis of the language used by the statute can lead to no other reasonable conclusion. The word "power," according to Webster's New International Dictionary, 1919, page 1687, means "the authority, capacity, or right." The word "abridged," according to the same reference, page 7, means "made shorter, lessened, diminished, curtailed, deprived of, or cut off."

And this Court, in construing the same kind of language, in the Knoxville Water Co. case, 189 U. S. 434, very clearly pointed out that the language used in the franchise ordinance, just as the language used in the ordinance in the case at bar, was in form "the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city."

It was not intended to tie the hands of the city council, or any succeeding council. It was merely intended, just as the language provides, that, "The gas company in consideration of the rights, privileges and franchises herein granted to it, agrees to and shall furnish the inhabitants of the city, gas for lighting, heating and other purposes" at the rates specified. "The rates which grantee is en-

titled to charge for service from and after three (3) years after the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa."

There is nothing in this language, either expressly or impliedly, in any manner abridging or attempting to abridge the power of the city council to re-adjust or regulate the rates at any time. The language used is the words of the utility company alone, except the provision as to what the rates should be after three years, which evidently anticipated the establishment of a utility commission, and were perfectly consistent with the existence of the power to regulate and fix other rates when the city council might deem such regulation expedient or necessary. This language was used in the contract at a time when the statute expressly provided for such a retention of power, and prohibited its abridgment, of which statute both parties had knowledge, and which statute necessarily became a part of the contract. And as said by this Court in the Cedar Rapids Gas case, "it was subject to the power retained by the city to regulate rates."

In Shreveport Traction Co. vs. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345, on page 353 of 129 Am. St. Rep. on rehearing, the Supreme Court of Louisiana said:

> "The whole contention of the defendants is predicated on the proposition that the City of Shreveport has no power to fix rates by contract so as to prejudice the subsequent regulation of such rates by the city council.
>
> "The **power to fix rates by contract and the power to regulate rates may coexist in the**

same council or other legislative body. Thus the legislature has the undoubted power to regulate rates, but at the same time may grant to a railroad company the right to charge rates within certain limitations. Such a grant is a contract, and the rights thereby vested cannot be divested or impaired by subsequent legislation. * * *

"There is no express legislation in this state authorizing municipalities to establish rates for street railroads by contract or agreement. But such power necessarily flows from the statutory prohibition that no railroad shall be constructed through the streets of any incorporated city without the consent of the municipal council thereof, and from the general power of regulating the use of the streets."

In Muscatine Lighting Co. vs. City of Muscatine, 256 Fed. 929, Judge Wade, said:

"It is earnestly contended that the power to 'regulate and fix,' excludes the power of the city to contract. This may be granted, so far as a contract binding on the city is concerned; but I cannot agree that there is any limitation upon the power of the city to 'regulate and fix' by contract, as well as by ordinance or resolution. * * * * *

"In the State of Iowa, a city is given the power to grant franchises without limitation, except that such franchise shall not extend more than 25 years and that no exclusive franchise shall be granted. When this law was

passed, it was, and still is, the well-settled rule that—

"'When a municipal corporation has the power to grant or refuse, in its discretion, permission to a public service company to occupy the streets with its structures, whether such permission be called a franchise, a license, a permit, or a mere designation of the streets to be occupied, it may grant such permission, subject to such conditions as it sees fit to impose.' 19 R. C. L. p. 1153, par. 427. * * *

"Section 725 confers the power to 'regulate and fix,' but it does not specify how such power shall be exercised, and under the rule above stated it has the power to use its own discretion as to how such power shall be exercised."

In Miller vs. City of Webster City, 94 Iowa, 162, 62 N. W. 648, Judge Deemer says:

"As the statute expressly confers upon the city the authority to establish markets and to provide for the weighing of commodities, and contains no limitations upon the powers granted, the time, manner, and expediency of its exercise are left to the discretion of the corporation; and the judgment of its officers upon such matters cannot be controlled by the courts, so long as they act within the scope of their authority. The discretion of a municipal corporation, within the sphere of its powers, is as wide as that possessed by the government of the state, subject, however, to the general rule that the ordinances must be reasonable. The

action of the city council in the exercise of expressly delegated powers cannot be questioned upon the ground that it is in conflict with public interests. • • •

"Of course, any contract regulating rates must be in the nature of things, 'one-sided,' so far as the rate is concerned. This is true because the city reserves to itself the power to change the rate at any time, subject only to the general rule that the new rate fixed must be reasonable. But I see no objections to a contract understandingly made which provides that the city (company) shall charge a maximum rate, which shall continue until such period as the same becomes unreasonable, and that at such time the city reserves the right to modify the same."

And in the same opinion Judge Wade says:

"It is of the highest importance that confidence of the people in the law, and especially in the sacredness of contracts, shall not be weakened. Every franchise and every power, under legislation, is construed most strongly against the grantee of a franchise. It is self-evident that to now hold that conditions relating to rates solemnly agreed to are without force would have a strong tendency to undermine the confidence of the public in the law, and would have a tendency to put utility companies under suspicion of repudiating their obligations.

"There is much force in the suggestion that regulation by contract should be permit-

ted, especially with reference to smaller towns, which cannot well afford the investigation and the trial of the question of the reasonableness of rates from time to time, and I believe it would be in the interest of said communities to have a law permitting a contract binding both parties as to rates for reasonable periods of time, say three or five years. This would stabilize conditions for the utility company and the city or town, and avoid expensive and unpleasant controversies.

"It is, of course, important that utility companies shall receive reasonable compensation for what is furnished. Upon the showing before the court (which for the trial of this issue I assume to be true) it is apparent that some of these companies cannot continue under the contract rates, because they have no source of income, except in the money received for the commodity furnished, and war conditions have radically increased the cost of production, so that a rate fixed at the time a franchise was granted a few years ago may be utterly inadequate at the present time to pay even current expenses; but these are conditions which the court cannot relieve, as has been recently held in Columbus Co. vs. City of Columbus (D. C.) 253 Fed. 499, and other cases.

"But there are other considerations. These cases are brought upon the claim that because the rates are confiscatory, the utility companies are deprived by the state of property without due process of law, and that they are denied the equal protection of the law. The Fourteenth Amendment to the Constitution of

the United States provides: 'Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"The state (and the municipality, which is an arm of the state) shall not 'deprive any person,' etc. At the foundation of these cases is the problem as to whether, upon the facts, the state or the municipality has deprived the utility companies of property without due process, or whether the state or municipality is denying the 'equal protection of its laws.'

"The courts are ever ready to enforce the provisions of the Constitution of the United States; but, in order to interfere with state or municipal legislation, it must appear that there is some affirmative act which constitutes the 'deprivation,' or the 'denial,' specified in article 14. When an ordinance is passed by a city council, under authority of the state, it is an act of the state, and if it deprives one of his property without due process, or denies equal protection, the act will be enjoined, for the Constitution is sacred, and must under all circumstances be upheld.

"But has the state, or the municipality, in these cases, done any act which violates the Constitution, except in so far as such act has been consented to by the companies? It is fundamental that every individual constitutional right may be waived. * * *

"It must be apparent that if the confiscatory rate is fixed, not by the municipality, but by the utility company, the state has done no

act 'depriving' the company of its constitutional rights. It must likewise be apparent that if the rate is the joint act of the utility company and the city, if the utility company has consented to the rate, that it has waived the constitutional right which it might otherwise assert, and I am convinced that if a rate is fixed by agreement of the utility company, which at the time is a reasonable rate, but which thereafter becomes confiscatory, without any act of the state, but simply as a result of industrial conditions, that the prohibition of the Fourteenth Amendment upon the state is not violated by the state.

"This is serious business, restraining the sovereign act of a state. There is no constitutional guaranty of compensatory rates. So far as income and profits are concerned, the utility corporation stands exactly in the same position as the building corporation, or the street improvement company. It may make money—it may lose money; but only when the state has acted affirmatively, to the deprivation of reasonable income upon actual investment, can constitutional guaranty be invoked; and where the utility company consents to the act of the state, there is not that 'deprivation' or 'denial' which the Constitution forbids."

The foregoing opinion was written by Judge Wade and filed March 24th, 1915, in the Muscatine, Fort Madison, Mt. Pleasant, Chariton, and Fairfield cases. The Fairfield case being the one now appealed to this court. The opinion was made to ap-

ply to all of the several cases, and separate judgment entries were recorded in each case.

The jurisdiction of the Federal court, in which the Iowa Electric Company commenced this action, is based on the alleged violation of the constitutional provisions referred to.

Hence, unless some act was done by the city council of the City of Fairfield violative of some constitutional rights of the appellant, this court has no power to give any relief.

Let us analyze the position of the appellant. It asked for an injunction to restrain and enjoin the defendant city, the mayor and members of the city council, as officers of said city and as representative citizens and taxpayers of said city and customers of the plaintiff. Now suppose this Court should remand this case to the District Court, which should in turn grant such relief as asked. What would be the effect of such an order? The only effect that could be hoped for by the plaintiff would be to permit the Iowa Electric Company to themselves fix the rates to be charged consumers for gas which has already been furnished, regardless of the statutory provision that such power should be ever vested in the city council. It would be to establish a precedent authorizing the utility companies of Iowa to fix their own rates upon a failure of the city council to exercise the power vested in it by the legislature, which power appellant contends, and we concede, is purely a legislative power.

If the power given to the city council to regulate and fix rates is more than permissive. If it can be said to be a duty enforced upon the city council. And if it can be said that the city council can and should be forced to act affirmatively. How can such

a duty be enforced by the Federal Courts upon an allegation that the Fifth and Fourteenth Amendments of the Constitution of the United States have been violated?

No case has ever come to our attention holding that the legislative action of a state legislature, or city council, can be compelled by **any court**, much less by a Federal court under a jurisdictional allegation of violation of the due process or equal protection clauses of the federal constitution.

Even if this Court should be of the opinion, therefore, that some remedy ought to be applied to the situation complained of, unless there has been a violation of some constitutional right of the plaintiff company by the defendants, this Court is without power to apply such remedy, even if it were able to ascertain and point out such remedy.

If any remedy exists it must be to compel the city council to take affirmative action to regulate rates. Such a remedy would be by Mandamus in the State Courts.

But, in order to admit of such a remedy, we would have to contradict the statement of appellant that the rate regulating function is purely a legislative function, which contention we are perfectly satisfied with, and do not desire to oppose.

This feature of the case is well pointed out in State vs. Lewis. (Ind. 1918- 120 N. E. 129)

There the Supreme Court of Indiana said:

> "In our opinion the petition in the case at bar presented a state of facts over which the commission had jurisdiction, and its refusal to consider the same was error. Our statute makes no provision for an appeal from such

order, nor does the law afford the relator an adequate and specific remedy. This being true, a common-law writ of mandamus will issue to the commission, requiring it to take jurisdiction of the petition. Public Service Commission vs. State ex rel., 184 Ind. 273, 111 N. E. 10; Flournoy vs. City of Jeffersonville, 17 Ind. 169, 174, 79 Am. Dec. 468; Crane vs. Champ, 12 Conn. 464."

See also State vs. Public Service Commission, (Wash. 1918) 172 Pac. 890.

In Chicago General Railway Company vs. Chicago, 176 Ill. 253, 68 Am. St. Rep. 188, the Supreme Court of Illinois said:

"If, in the exercise of its sound discretion, the city council shall determine that the best interests of the public do not require the imposition of any conditions whatever, it may grant its license without qualification; but if, on the other hand, the public interest requires that the occupancy of particular streets, under peculiar conditions, demands that certain exactions shall be made of the company for the privileges conferred, then the city council has a right to so provide, and no constitutional right or privilege is interfered with. There is no general law of the State of Illinois, nor is there an ordinance of the city of Chicago, requiring all street railway companies to pay a mileage tax, but, as we have said, discretionary power is conferred by the legislature upon the city council to impose such a condition upon

giving its consent to any particular company to occupy its streets.

"We are also of the opinion that even though it might be held that the condition upon which the permit or license was granted to the defendant railway company was ultra vires, the city not having the power to impose it, nevertheless, the ordinance having been accepted by the company with the condition attached, agreeing thereby to perform it, it became a valid contract between it and the city, the validity of which the defendant is now estopped to deny. The act of the city in imposing the condition cannot be treated as against public policy or prohibited by statute, and void, and therefore, having accepted the contract in its entirety and enjoyed the benefits for which it agreed to pay the amount prescribed, it cannot now repudiate that contract; Kadish vs. Garden City, etc., Bldg. Assn., 151 Ill. 531, 42 Am. St. Rep. 256; Cook County vs. Chicago, 158 Ill. 526; Fulton vs. Northern Illinois College, 158 Ill. 333.

"It is well settled in this state that while the granting of authority to occupy the public streets of a city for other than the ordinary purposes of a street is, in the first instance, a mere license, still, when that license is granted upon conditions, and the licensee has accepted the privilege and performed the conditions, it becomes a contract. Here it must be admitted that the defendant could only occupy the streets of the city with its tracks by the consent of the municipal authorities. That consent could be given or withheld, as these authorities deemed

proper; and upon such conditions as they considered for the best interests of the public they granted the privilege and named the conditions. The defendant accepted, without qualification. It has availed itself of the benefits of the contract, and now seeks to repudiate the conditions. We are unable to see upon what principle, under the law of contracts, it can be allowed to do so."

In Farnsworth vs. Boro Oil & Gas Co., 109 N. E reading from page 861 we find this statement:

"It lived up to those conditions until November, 1911. In the summer of that year it applied to the town board to modify the permit so as to allow a charge of 30 cents per thousand cubic feet. The request was refused. The defendant then gave notice to the board and also to its consumers that, notwithstanding the conditions of the permit, it proposed to charge the increased rate. It has carried out its threat, and it now repudiates the conditions. It says that it did not need the permission of the town board. It says that what it should have obtained was the consent of the commissioner of highways. Because it requested and received the approval of the wrong officers, it says that its acceptance of the conditions must be held to count for nothing. It proposes to stay in the highways and charge whatever it pleases.

"I think the defendant is estopped to deny the binding force of its agreement. It applied to the town board for permission to lay its pipes in the highways of the town, and it re-

ceived the permission for which it prayed. The privilege may be one that the board was not competent to grant, but at least it believed itself competent, and the defendant shared that belief. There was a claim of right which the defendant extinguished for a price. The board asserted the power to regulate the use of the highway and to prevent the defendant's entry. The defendant yielded to the claim and purchased the coveted consent. It received the very benefit which it sought, the opportunity to lay its mains without molestation of its possession or question of its right. * * *

"Under such circumstances, the defendant will not be heard to say, while retaining possession of the highway, that the consent under which it entered was valueless and void."

In Chas. Simon's Sons Co. vs. Maryland T. & T. Co., (Md.) 63 L. R. A. reading from page 736 we find this statement:

"It cannot be here objected by the appellee that the regulation contained in the ordinance here in question as to rates of charge was not a reasonable one. The time to have urged such a consideration was before it accepted the ordinance and availed of the privileges it acquired thereunder. Whatever may have been the description of service the appellee was to furnish under ordinance 110, it would seem to be concluded as to the reasonableness of the rates of charge for that description of service by its own voluntary action."

In Bismarck Gas Company vs. District Court of Burleigh Co., the Supreme Court of North Dakota in an opinion filed January 9, 1919, reported in 170 Northwestern, page 878, said:

> "The plaintiff cites several cases holding that the courts have no jurisdiction to fix rates, but the question presented is not one of rate-fixing. The question is: May the Gas Company, or any party, accept a grant of a charter and avail itself of the benefits, and repudiate its conditions and obligations? May it accept from the city a valuable charter, fixing a maximum rate for gas, and then turn around and charge twice the maximum rate? And in such a case shall we say the city may not invoke the courts to forfeit the charter or to enforce its conditions? Assuredly it is a familiar rule of law that a grant upon conditions may be forfeited for a failure to observe its conditions.
>
> "But if the question presented be merely one of contract, then clearly it was competent for the city, in granting a franchise, to protect itself and the people of the city by contracting for maximum rates. That is in accordance with the well-reasoned decision by Judge Amidon in a Moorhead case. 255 Fed. 920. * * * * While Judge Amidon cites many authorities to sustain his decision, which is manifestly sound and in accordance with elementary principles, there is no reason for magnifying this case by any review of the authorities."

In Columbus Ry., Power & Light Co. vs. City of Columbus, decided by this Court April 14, 1919,

reported in 39 Sup. Ct. Rep. 349, this Court held that it had jurisdiction.

But the facts and cause of action in that case were not like those in the case at bar in this:

In that case the utility company attempted to surrender its franchise and discontinue the service and brought an action in the Federal court asking for an injunction restraining the city and officials and members of the city council from compelling the company, or attempting to do so, to operate its lines of street railway in the city of Columbus under the said ordinances, from in any way forcing, compelling, or attempting to compel, it to charge only the rates prescribed, etc.

The distinction between the two cases is apparent. In that case the utility company was not seeking to collect increased rates and collect rates of their own making, and enjoin the city authorities from interfering with such collection.

This Court held, in that case that the utility company was bound by the franchise rates, and that increased cost of operation not contemplated when the franchise ordinance was accepted was no defense, but jurisdiction of the court was based on the fact that affirmative action on the part of the dedendants was alleged. That defendants in that case were attempting to compel operation by the company at a loss. In the case at bar there is no such allegation and no fact upon which such an allegation could be based. The city authorities were not alleged to be doing anything other than attempting to **prevent** the Iowa Electric Company from collecting **increased** rates which the utility company was itself attempting to establish. No attempt was made, and no disposition suggested, to surrender

any benefits which the company held under the franchise ordinance.

In Emporia Telephone Company vs. Public Utilities Commission, 154 Pac. 262, the Supreme Court of Kansas, said:

> "3. A court has no jurisdiction to fix the rate to be charged by a utility for services to be rendered in the future, that being a legislative and not a judicial function. • • • The considerations that prevent a tribunal from fixing a rate to be charged in the future also forbid its accomplishing the same result by enjoining interference with a rate which it finds to have been unassailable in the past. Interstate Comm. Commission vs. Railway Co., 167 U. S. 479, 511, 17 Sup. Ct. 896, 42 L. Ed. 243."

The same court further said:

> "But while a court is powerless to fix a rate for the future, it is authorized to prevent the enforcement of any **order of a board, or of any statute**, attempting to establish a noncompensatory rate."

Thus it appears that it is only in cases where the rate has been established in some manner without the assent or consent of the utility company, that the court can interfere by injunction to prevent enforcement of such order or statute on the ground that it is confiscatory in its effect.

In Missouri Pac. R. Co. vs. Kansas ex rel Taylor, 216 U. S. 262, 30 Sup. Ct. Rep. 330, reading from page 335, this Court said:

"But we do not think that the case here presented requires us to consider the issues of fact relied upon, even if it be conceded, for the sake of argument only, that, on a writ of error to a state court, where a particular exertion of state power is assailed as confiscatory, because ordering a service to be rendered for an inadequate return, the proof upon which the claim of confiscation depends would be open for our original consideration, as the essential and only means for properly performing our duty of independently ascertaining whether there had been, as alleged, a violation of the Constitution. We say this because, when the controversy here presented is properly analyzed, the first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist. The difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of the corporation by fixing them below a proper remunerative standard, and an order compelling a corporation to render a service which it was essentially its duty to perform, was pointed out in the Atlantic Coast Line R. Co. vs. North Carolina Corp. Commission, supra." * * * *

And further on in the same opinion we find this statement:

> "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, binding in favor of the corporation as to all rights conferred upon it, and devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred. Was the duty which the order here commanded one which the corporation was under the absolute obligation to perform as the result of the acceptance of the charter to operate the road is then the question to be considered."

In City of Belfast vs. Belfast Water Co., 98 Atl. 738, the Supreme Court of Maine, in an opinion filed Sept. 28, 1916, said:

> "The city takes issue with the defendant on all these propositions. But it contends, also, that the defendant is now estopped from denying the validity of the contract which it adopted, and the benefits of which it has received. It is also urged that if the contract was ultra

vires, it was so only as to the city, and that the question of ultra vires, and the contention that the contract was against public policy, can be raised only by the municipality affected, and not by the other contracting party.

"It has been repeatedly held, and we think with good reason, that when a party has accepted the benefits of a contract, not contra bonos mores, he should not be permitted to question the validity of it; that he is estopped. Ft. Worth City Co. vs. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167; Richardson vs. Welch, 47 Mich. 309, 11 N. W. 172; Doane vs. Lake Street, etc., R. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265; Collins vs. Cobe, 202 Ill. 469, 66 N. E. 1079; State vs. Germania Bank, 90 Minn. 150, 95 N. W. 1116; Gibbs vs. Craig, 58 N. J. Law, 661, 33 Atl. 1052; Flower vs. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Dyer vs. Walker, 40 Pa. 157; 2 Pars. on Contracts, 961. And in Joy vs. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843, where a railroad company was in the enjoyment of a right of way through a park, and had received the benefit of a large sum of money expended by the park commissioners, under an agreement with them, the court said that, without offering to return the property obtained by virtue of the agreement, it could not be heard to allege that the agreement was against the policy of the law.

"Again, while it is true that in general the courts will refuse to enforce contracts contra bonos mores, there is good reason for saying

that the defense of ultra vires can be made only by the party whose acts, or the acts of whose agents, are claimed to be ultra vires. The ultra vires contract of a municipality is a legal wrong. The party that is wronged may be relieved. The other contracting party is not wronged in the eye of the law. And it would seem that it cannot seek to be relieved from a contract with which the other party is content. We have found no case where the other contracting party has been relieved, from a contract ultra vires a municipality. Ultra vires is properly a defensive proposition. It is a defense to an action seeking to enforce a contract. In every case, we think, it has been held the municipality that sought relief. It is well settled that courts will not declare a statute unconstitutional except at the instance of those whose rights are injuriously affected by the unconstitutional provision. They and they alone can do this. Courts will never, at the suit of one, pronounce a statute unconstitutional because it may impair the rights of others complaining. Williamson vs. Carlton, 51 Me. 449; Wellington et al., Pet'rs, 16 Pick. (Mass.) 87, 26 Am. Dec. 631; Hingham, etc., Corp. vs. County of Norfolk, 6 Allen (Mass.) 353; Red River, etc., Bank vs. Craig, 181 U. S. 548, 21 Sup. Ct. 703, 45 L. Ed. 994. And if an unconstitutional provision cannot be attacked except by one whose constitutional rights have been invaded, much more it would seem for like reasons that a mere ultra vires contract could be attacked only by the party as to whom it is ultra vires. The decisions of the Federal

courts in national bank cases are illustrative. They point to the doctrine that the ultra vires transactions are utterly void when made the basis of suit to charge the bank with liability, but when the bank seeks to enforce advantages obtained through such transactions, even though they are impliedly forbidden, they are valid unless questioned by the government. Bank vs. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; Gold Mining Co. vs. Bank, 96 U. S. 640, 24 L. Ed. 648; Bank vs. Mathews, 98 U. S. 621, 25 L. Ed. 188; Reynolds vs. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; Bank vs. Gadsen, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258."

In City of Tipton vs. Tipton Light & Heating Company, 176 Iowa, 224, in an opinion filed May 10, 1916, the Supreme Court of Iowa said:

"As bearing upon this question, see 4 McQuillin on Municipal Corporations, Sec. 1729, in which it is said:

"'If the price of the supply is fixed by contract or otherwise, the company has no right to require consumers to pay meter rent in addition to the regular rate. So where the rates are fixed, they cannot be indirectly increased by charging a certain sum for taking readings of meters,' citing authority.

"See, also, Abbott on Municipal Corporations, ol. 3, Sec. 915, in which it is said:

"'The right of the licensee to fix the rates at which its commodities or services may be supplied and furnished, may be limited by con-

ditions in the license, grant or statutes. Or, again, by the universal rule which prevails that in the absence of express restrictions, rates charged must be reasonable. This latter principle is based upon the idea that persons or corporations carrying on the business of furnishing light, water, power or transportation, are to be regarded as engaged in a quasi public business . . . The state or its subordinate agencies, under these conditions, retains the right to limit charges to those which are reasonable, considering all the circumstances under which they are supplied.' * * *"

And again, in the same opinion, the Supreme Court of Iowa said: (Page 239).

"A distinction must be kept in mind between the power to regulate rates and the power to contract as to rates."

Appellant now claims there is no power to contract as to rates, but the above language of the Supreme Court of Iowa recognizes the existence of such a power, as well as the power to limit the right of the licensee to fix rates, by conditions in the grant.

In City of Noblesville vs. Noblesville Gas & Imp. Co., 157 Ind. 162, 60 N. E. 1032, the Supreme Court of Indiana said:

"The city had the unquestionable right to grant to any person, firm or corporation a franchise to occupy its streets and alleys for conveyance of gas to consumers. But it was under

no compulsion to convey such right to any one. The subject of grant rested in contract, like any other matter. As the price of the right, the city was at perfect liberty to demand that the charges for gas furnished the city and its inhabitants should not exceed certain prices. The appellee was at perfect liberty to reject or accept the city's proposal. The terms proposed on the one hand and accepted on the other made a contract as valid and enforceable as if made by two individuals. City of Indianapolis vs. Consumers' Gas Trust Co., 140 Ind. 107, 116; Western Paving & Suppy Co. vs. Citizens' St. R. Co., 128 Ind. 531, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462. That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract; and the power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires the consent only of the one body, the other the consent of two. In this instance the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of its bargain."

Appellant argues that there is no specific authority given by the legislature to confer any power or authority upon municipalities to enter into lawful and binding contracts with public utility companies fixing gas, water, heating or electric rates, to be charged to private consumers.

This proposition, if conceded, operates against rather than in favor of appellant's contentions generally.

In Manitowoc vs. Manitowoc etc. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056, after a careful review of a large number of authorities, on page 1065 of 140 Am. St. Rep., the Supreme Court of Wisconsin says:

> "No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that * * * * * the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act."

In the same opinion, reading on page 1065 of 140 Am. St. Rep. the Court said:

> "Statutes granting to cities the right to make long-time contracts binding on the public and fixing a rate to be charged by a public service corporation are not looked upon with favor, and will be strictly construed. It is only where the right is very clearly conferred that the state will be held to have relinquished its power to enact laws regulating tolls."

A proper analysis of the above decision, and the large number of cases cited in support of it, in-

dicates that the law of interpretation and construction of statutes requires that a very clear expression of intention to exclude or suspend the power of regulation must appear in the language used before it can be held that there has been any intention to exclude or suspend such power.

Hence, if we adopt appellant's contention that the city council acted in a legislative capacity in passing Ordinance No. 192, we must find in the language of such ordinance very clear expression of an intention to exclude or suspend the power given by Section 725 to afterwards regulate and fix rates. No such language can be found in the ordinance in question, and we can safely say there was no intention on the part of the city to either abridge or suspend their statutory power to regulate rates. And we believe we can with equal candor say that there was never any intention on the part of the state legislature, that can be ascertained from any language ever used in any of its Acts, to prohibit cities from fixing rates in the franchise ordinance, which rates should continue in force until such time as the city council deemed it expedient or necessary to exercise their statutory power to regulate and fix other rates. And until such time, and no longer, the contract remained valid between the parties.

The only meritable argument that can be presented against what, in this one particular, would seem to be a one-sided agreement, is that the individual members of the city council, or at least some of them, are also consumers of gas and patrons of the appellant, and would in this respect be personally interested in the matter to be determined by them in exercising, or declining to exercise, the statutory power to regulate and fix other rates than

those fixed by the franchise contract. In other words, if the cost of production went down they would be likely to regulate rates downwards, but if the cost of production went up their personal interest might serve to deter them from acting at all.

It is this feature of the case that leads appellant to the contention that the contract is not mutual.

But, appellant is not supported by the decisions in this contention. If the city council had only the power to reduce rates there would be force in its contention. But such is not the case. The city council has the power not only to reduce, but it also has the same power to increase rates. It is only then the fact of their personal interest in the result that might make the law unfair in its actual administration that gives rise to the contention of the want of mutuality, and not anything inherent in the law or the contract of the parties.

This phase of the matter is directly passed upon by this Court in Home Telephone & Telegraph Company vs. Los Angeles, 211 U. S. 265, 53 L. Ed. 176, 29 Sup. Ct. Rep. 50, in the following language:

> "The appellant further insists that the city council is not an impartial tribunal, because, in effect, it is a judge in its own case. It is too late, however, after the many decisions of this Court which have either decided or recognized that the governing body of a city may be authorized to exercise the rate-making function, to ask for a reconsideration of that proposition. In this connection the appellant calls attention to the fact that, by the charter of the city, 25 per cent of the electors may recall a member of the council and require him again to stand

for election. Nevertheless, he takes part in the rate-making function under his personal responsibility as an officer, and it cannot be presumed, as matter of law, that the keener sense of dependence upon the will of the people which feature of his tenure of office brings to him will distort his judgment and sense of private justice. It would be conceivable, of course, that the members of the legislature themselves might be subject to the same process of recall, but it hardly would be contended that that fact would lessen the legislative power vested in them by the Constitution and laws of the state."

Under a proper anaysis then there is no lack of mutuality in the franchise ordinance contract. The city at large, the consumers of gas, and patrons of the Iowa Electric Company, and the Iowa Electric Company itself, are all in the same category and situation at the time the ordinance contract is in effect. Either can petition the city council, that body in whom is vested the legislative function of regulating and fixing rates, to either raise or lower the rates fixed by the franchise ordinance at any time, and that legislative body has the power to regulate and fix other rates, either higher or lower.

There is then nothing in the law that would make the original franchise ordinance contract void for lack of mutuality. It is only the assumption that the **city council** will not regulate upwards when such regulation in equity and good conscience ought to be done, that gives rise to appellant's contention. Let us, for illustration, assume that the members of the city council are all disinterested, having no in-

terest in the result of the regulation prayed for, and not being dependent upon any of the consumers or patrons of the appellant for political support, and not being neighbors, friends, or even acquaintances, of either of the parties concerned. And also assume such members to be mentally and physically qualified to know and understand all of the matters proper to be considered, and that upon proper application being presented they had the power to raise or lower rates as they deemed expedient or necessary. What is there in the present record inconsistent with such an illustration, that is not entirely covered by the quotation from the Home Telephone Co. case above referred to?

Appellant says such a contract binds the utility company as to rates and does not bind the city. This contention is not tenable. Both the utility company and the city, the tax payers, gas consumers, and patrons of the gas company, and all other privies to the franchise contract are absolutely bound by the rates named therein until such time as the "city council" shall deem it expedient or necessary to either raise or lower rates. And if rates are then either raised or lowered in such manner as to deprive either of the parties or their privies of their property without just compensation, then either party will be protected by the courts against any such unjust legislative action.

But, as said in the Tipton case, 176 Iowa, on page 239:

> "A distinction must be kept in mind between the power to regulate rates and the power to contract as to rates."

And again in the Manitowoc case, 140 Am. St. Rep. on page 1065:

> "The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer."

And again in the same case on pages 1066 and 1067:

> "It is contended that this law has superseded the contract involved in this suit, and that therefore the contract no longer has any binding force or effect. We do not think so. The statute worked no change in existing rates. It simply provided that all rates should be reasonable, and left to the railroad commission the power to determine the fact as to whether or not a given rate was reasonable. When that determination was reached the law became operative upon the particular rate called into question, and the rate arrived at then became the lawful rate and continued so until set aside in the manner provided by law. The railroad commission has made no determination in the case before us; at least if it has, it is no part of the record. Until that determination is made the contract is in force. When it is made the contract is superseded, **if the rate is changed.** * * * * * Usually, long-time contracts made under like conditions operate against the public interest, and, if the fare provided for is unreasonably low, the legislature has the same power over it that it would have if it were unreasonably high. It may also be

that adequate service cannot be given at the rate fixed or that conditions have so changed that the road cannot be operated unless rates are increased and that the public will be better served by raising the rate than by permitting it to remain where it is. This is a question which calls for the exercise of legislative policy and discretion. The court cannot relieve the defendant from an improvident contract, but the contract is of such a character in the present instance that the legislative branch of the government may, in the interest of the public, abrogate it. If, as contended by counsel for the respondent, no contract was entered into and we were dealing with the ordinance as a legislative enactment pure and simple, and not as a part and parcel of a contract, there might be good reason for the claim that it is superseded by chapter 362, Laws of 1905, without any affirmative action on the part of the railroad commission. But such is not the case before us."

The statute in question, Section 725, assumes the existence of a rate already in effect. The statute providing for, and for the retention of, **power to** "regulate and fix" rates. Unless there is a rate in existence there would be nothing to **regulate and fix.**

This is well pointed out in Omaha Water Co. vs. City of Omaha, 147 Fed. 1, in this language:

"The power to fix and to regulate the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation, and other public utilities partakes

of the nature of a governmental power and also of that of a business power. Are the inhabitants of the city paying rates not fixed by contract to quasi public corporations for public utilities? The power to so regulate these rates that they shall not be unreasonable is a legislative, a governmental power which the state or city may exercise, but may not renounce. Is a city without waterworks and hence without rates at which anyone will furnish water therefrom to the municipality or its inhabitants? The making of a contract for the construction and operation of waterworks wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate."

Let us reverse positions with appellant. Suppose, for example, some of the consumers of gas had made application to the city council of Fairfield for a reduction of rates, instead of the Iowa Electric Company making application for a raise. And suppose the city council had declined to change the rate existing under the franchise agreement. Would appellant then contend that such consumers of gas would have the right to reduce their own rates, and secure an injunction from the Federal courts to compel the utility company to furnish gas at a less rate than is provided by such franchise ordinance, and prevent such company from collecting a higher rate than the consumers themselves were willing to pay,

upon allegations by such consumers that the cost of production had decreased, and that to take from them the franchise rate would be taking their property without just compensation? To ask this question is answer enough. The company would then very properly say, what we now contend, that the rate fixed in the franchise ordinance should continue until the city council deemed it expedient and proper to change the rate, in the exercise of its legislative discretion, and that it was not for the consumer to determine for himself this question of reasonableness or unreasonableness of such rate.

In City of Woodburn vs. Public Service Commission, 161 Pac. 391, the Supreme Court of Oregon said:

> "The right of the state to regulate rates by compulsion is a police power, and must not be confused with the right of a city to exercise its contractual power to agree with a public service company upon terms of a franchise. The exercise of a power to fix rates by agreement does not include or embrace any portion of the power to fix rates by compulsion. When Woodburn granted the franchise to the Telephone company, the city exercised its municipal right to contract, and it may be assumed that the franchise was valid and binding upon both parties until such time as the state chose to speak; but the city entered into the contract subject to the reserved right of the state to employ its police power and compel a change of rates, and when the state did speak, the municipal power gave way to the sovereign power of the state."

Under the Oregon statute the city council did not have the power to regulate rates while in Iowa such power is expressly delegated to the city council.

There is however a distinction between the city council which acts as a legislative body, and the city when acting in a private or business capacity, and this distinction has been recognized in very recent decisions of the Supreme Court of Iowa. See the Tipton case, 176 Iowa, 239.

The Jones Auto case is an illustration of the power to raise rates as well as to lower them, and also points out that rates might be fixed by the **utility company** in the **absence of rates** being fixed by the city council **or of any contract.** See 182 Iowa, page 985.

The foregoing authorities very clearly demonstrate, and appellant would not contend otherwise, that if the State of Iowa had a Utility Commission, or if the State Legislature had still retained the right to regulate rates, that until the affirmative action of such Utility Commission, or of the State Legislature, as the case might be, both the utility company and the city would be bound by the rates fixed in the franchise ordinance.

This being true, then, in order to deprive the city of the power to fix rates in the first instance by agreement in the franchise ordinance, it would have to be done on the ground of incompatibility of interest solely, upon mere inference, and against the natural meaning of the words used in the statute. And such a process of statutory mis-construction has never been recorded in any case, so far as we have been able to ascertain, by a Federal court, under a jurisdictional allegation under the "due

process" or "equal protection" clauses of the Constitution.

The case of Milwaukee Elec. R. & L. Co. vs. Railroad Com., 238 U. S. 174, so much relied upon by appellant, contains the following language:

> "The chief justice in the opinion in the present case regarded the construction of Sec. 1862 as controlled by the previous case of Manitowoc vs. Manitowoc & N. Traction Co., 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925. In that case, the Supreme Court of Wisconsin used the following language, which is quoted with approval by the chief justice in this case:
>
> "'No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting Sec. 1862, Stat. (1898), or Sec. 1863, Stat. (Supp. 1906: Laws of 1901, Chap. 425), the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act.'
>
> "The chief justice further pointed out that Sec. 1863, which was in question in the Manitowoc case, was substantially the same as Sec. 1862, involved in the present case; for while Sec. 1863 authorized consent by municipal au-

thorities to the use of streets upon such terms and subject to such rules and regulations and the payment of such license fees as the council or board may from time to time prescribe, it was the same in effect as Sec. 1862, authorizing municipal authorities to grant the use of streets upon such terms as they shall determine, and concluded:

"'We are of the opinion, therefore, that the holding in the Manitowoc case, to the effect that neither section indicated any legislative intention of surrendering the sovereign power of the state to regulate fares, was entirely correct and was advisedly made.'"

This Court in that case said:

"In the view we take of the case it is unnecessary to pass upon the question whether the ordinance had the effect to make a contract binding between the city and the company until subsequent legislative action by the state, or to decide whether the grant of the rights and privileges as to fares was, under the Wisconsin Constitution, revocable at the will of the legislature."

The case of Salt Lake City vs. Utah Light & Traction Co., decided by the Supreme Court of Utah May 2, 1918, and reported in 173 Pac. 556, contains a very exhaustive review of the authorities and, on page 561, contains the following language:

"We have no difficulty in reconciling the decisions in those cases. It is now settled law

that so long as the state does not interfere, the rates agreed upon between the cities and the street railway companies in the franchise ordinances are binding and enforceable. Neither party, without the consent of the other, may disregard any rate that is agreed upon between them."

In Kansas City Bolt & Nut Co. vs. Kansas City Light & Power Co., 204 S. W. 1074, 275 Mo. 529, affirmed by this Court in 254 U. S. ...., 41 Sup. Ct. ...., 65 L. Ed. ...., the Supreme Court of Missouri said:

"While there are some minor proposition discussed in the briefs, there is one main question which will dispose of the case. We shall therefore confine our discussion to the one main question, viz: 'Did the order of the Public Service Commission, fixing the rates which the defendant company could charge for electric energy at Kansas City, Mo., supersede the rates fixed by the contract theretofore existing between the parties?'

"Under the recent holding in the cases of State ex rel City of Sedalia vs. Public Service Commission et al., 204 S. W. 497, and City of Fulton vs. Public Service Commission, 204 S. W. 386, the above question must be answered in the affirmative. In the Sedalia case, supra, it was held by Division 1 that the schedule of reasonable water rates fixed by the Public Service Commission superseded the rates fixed by contract between the municipal corporation and the public service corporation. It was there held: (1) That the power to make

rates for public service arises from the police power of the state; (2) that the instrumentality designated by statute to exercise such rate-making power is the Public Service Commission; (3) that under the provision of Article 12, Section 5, Constitution of Missouri, the police power cannot be abridged by contract; (4) that therefore, when the Public Service Commission fixes a schedule of reasonable rates for public service in conformity with the provisions of the Public Service Commission Act, such rates automatically supersede all contract rates coming in conflict therewith. The above case was cited and approved by court in banc in the Fulton Case, supra. The principle involved in the case at bar is the same as that involved in the two cases cited. No valid reason can be stated why a rate contract entered into between a private manufacturing corporation and a public service corporation (as in the situation here) would not (if permitted to stand), be just as much an abridgment of the rate-making power of the state as would a rate contract between a municipality and such public service corporation (as was the situation held in judgment in the cases above cited)."

In Public Utilities Commission vs. Wichita R. & Light Co., 268 Fed. 37, the Circuit Court of Appeals for the Eight Circuit, in an opinion filed July 15, 1920, said:

"In Kansas City Bolt & Nut Co. vs. Kansas City Light & Power Co., 275 Mo. 529, 204

S. W. 1074, it was held: Rates fixed by contract with a public service company for electricity to be supplied, are superseded by rates fixed by the Public Service Commission, since the police power of the state cannot be abridged by contract. On writ of error from the Supreme Court, this judgment was affirmed by a per curiam opinion upon the authority of Union Dry Goods Co. vs. Georgia Public Service Corporation, 254 U. S. ...., 41 Sup. Ct. . .., 65 L. Ed. ...."

The foregoing authorities show that the courts recognize the validity of contracts as to rates until such rates are **superseded** by other lawful rates established by the legislative body having that power. It will be noted, however, that none of the courts have ever held that prior to such action by such legislative body the utility company can itself establish higher rates than the contract rates. But, on the contrary, all of the courts have said that the contracts rates are subject to the reserved power of rate regulation, and that they remain binding and enforcible until the exercise of such power by State Legislature, City Council, Public Utility Commission, or whatever other body may have been designated to exercise the rate-making function.

It will also be noted that the mere fixing of or agreement for, rates or maximum rates, has never been regarded as any abridgment, or even attempt to abridge, the power to regulate.

To the same effect are Trenton & Mercer County Traction Corporation vs. City of Trenton, 101 Atl. 562. (New Jersey), State ex rel Tacoma R. & P. Co. vs. Washington Public Service Com., 172 Pac. 890, and Sausalito vs. Marin Water & Power Co., P U. R. 1916A, 244.

RESPONSE TO APPELLANT'S ARGUMENT

DIVISION ONE

MUNICIPALITIES HAVE EXPRESS AUTHORITY TO FIX RATES BY CONTRACT.

(a) Appellant concedes in argument that power to contract as to rates was expressly authorized by the Statutes of Iowa prior to the enactment of Chapter 16 of the 22d G. A. (App. Arg. page 46).

It is, however, contended in argument that:

"The effect of Chapter 16 of the 22d G. A. was to take away from cities of the first and second class having over 7000 inhabitants, * * * the power they had theretofore pos-

sessed of contracting as to rates." (App. Arg. page 47).

No attempt is made to explain the language of that act, and in fact no reference is even made to the express provisions of that act, which it is contended "take away" the right theretofore possessed.

That language, however, not only does not sustain appellant's contention, but on the contrary, expressly eliminates such a contention by providing:

> "All cities of the first class and cities of the second class having over seven thousand inhabitants and cities organized under special charters in this state **in addition to the powers now granted, shall have the further and additional powers conferred by this act.**"

Appellant's argument indicates familiarity with this act, but for self evident reasons makes no mention of these specific words contained in the statute.

None of the cases cited on this proposition by appellant are in point.

There is, however, a well established rule that the language of all ordinance franchises shall be construed most strongly against the utility companies, and if there is any doubtful language used, such doubt shall be determined in favor of the city.

DIVISION TWO

SECTION 725 CONFERS EXPRESS POWERS ON MUNICIPALITIES OVER GAS RATES, BUT DOES NOT THEREBY ELIMINATE ANY OTHER POWERS.

This proposition is settled by the language of the act in question above quoted. This language the Supreme Court of Iowa says was a substantial re-enactment of the provisions of said Chapter 16.

DIVISION THREE

THE LEGISLATIVE HISTORY OF SECTIONS 720 AND 725 DISCLOSES AN EXPRESS INTENT TO **NOT** WITHDRAW OR DENY ANY POWER, BY EXPRESSLY PROVIDING FOR FURTHER AND ADDITIONAL POWERS, IN ADDITION TO THE POWERS NOW GRANTED.

DIVISION FOUR

SECTION 720 OF THE SUPPLEMENT TO THE CODE DOES NOT SPECIFY ANY CONDITIONS AT ALL. IT PROVIDES LIMITS OF TWENTY-FIVE YEARS AND FOR A VOTE OF THE ELECTORS.

Such provisions are not conditions at all, because they preclude the granting of any franchise at all.

We are unable to perceive how a franchise could be said to be granted upon either of **such conditions** for the reason that if either existed there could be no franchise.

DIVISION FIVE

APPELLANT SAYS THE LONG SETTLED CONSTRUCTION OF THE IOWA STATUTES BY THE IOWA SUPREME COURT IS THAT, THEY DO NOT CONFER ANY POWER OR AUTHORITY UPON MUNICIPALITIES TO ENTER INTO CONTRACTS FIXING RATES, BUT TO THE CONTRARY PROHIBIT THE MAKING OF SUCH CONTRACTS.

In support of this contention appellant cites five Iowa cases, all but one of which were decided since Judge Wade's decision in this cause. The other, the Jones Auto case, being the only case previously decided, and which does not support such contention. None of these cases involve the same facts as appear in this case.

DIVISION SIX

THERE ARE NO PREVIOUS HOLDINGS OF THE IOWA SUPREME COURT, CONSTRUING THE IOWA STATUTES IN THE MANNER CONTENDED FOR. BUT, THERE ARE DECISIONS OF THE IOWA SUPREME COURT HOLDING TO THE CONTRARY, AND THERE ARE ALSO DECISIONS OF THE FEDERAL COURTS CONSTRUING SUCH STATUTES.

Des Moines vs. Waterworks Co., 95 Iowa, 348.
Waterworks Company vs. City of Creston, 101 Iowa, 687.
Iowa Railway & Light Co. vs. Jones Auto Co., 182 Iowa, 982.
City of Tipton vs. Tipton Light & Heating Co., 176 Iowa, 224.
Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655.
Muscatine Light Co. vs. Muscatine, 256 Fed. 929.
Smittle vs. Haag, 140 Iowa, 492.
Thompson vs. Mitchell, 133 Iowa, 527.

The case of Raymond vs. Parish of Terrebonne, 28 Fed. 773, confines the rule to the facts as there stated:

> "We are of the opinion that the construction there given (referring to the decision of the state court) of the statute, authorizing the issue of the bonds in suit,—the additional fact having been found by us that the plaintiff **took title after that decision was made public,**—is binding upon this court; the question in that respect being one of local statute, and not of general commercial law. We are also of opinion that the construction is correct, provided the questions were new."

No one could take exception to such an opinion. But it is not applicable to the facts in the case at bar. In this case there was no previous decision of the Iowa Supreme Court supporting appellant's contention, but, on the contrary, there were both State and Federal, and United States Supreme Court decisions recognizing the validity of contracts fixing rates, subject only to the power to regulate and fix other rates as the city council might deem such regulation expedient or necessary. Furthermore, the question now involved is one of general law applicable to all states generally.

The Town of Woodward case was an action by the city to compel specific performance. The defendant was a public utility corporation, one of Mr. Reed's companies, holding a franchise from the town of Woodward. It furnished the service for many years at the rates provided in the ordinance. In 1918, it declared its inability to further furnish such service. It did not seek to retain the benefits of the franchise. The town was asking for an injunction against the utility company to enjoin a breach. There was no evidence of any actual ac-

ceptance of the terms, and no provision in the ordinance, like the case at bar, that the rates should be, after three years from acceptance of the ordinance, such lawful rates as are fixed by the body authorized to establish rates.

The opinion is not a well considered one, was filed after the decision by the Federal District court in the case at bar, and the questions presented in this case were not raised or passed upon.

The writer of the opinion makes this statement:

> "By Chapter 16, Acts 22d G. A., this right of contract by the city council was taken away from cities having a population of 7000, or more, but was still permitted to cities of lesser population. By the revision and codification of 1897, the right of contract as to rates for utilities of this character was entirely eliminated, and the legislative power to regulate rates was conferred upon the city council in all cases. The reason for the change is obvious enough."

This statement is not supported by any authority, and is contrary to the express language of the act in question. It is not a construction of any statute at all, but is a deduction made from what the writer of the opinion evidently thought the law ought to be. It is also directly in conflict with the decision of this Court in the Cedar Rapids Gas case, 223 U. S. 655, and the previous decisions of the Iowa Supreme Court in the Jones Auto case, 182 Iowa, 982, Creston Waterworks case, 101 Iowa, 687, the Tipton case 176 Iowa, 224, Smittle vs. Haag, 140 Iowa, 492, Thompson vs. Mitchell, 133 Iowa, 527, Muscatine Lighting Co. vs. Muscatine, 256 Fed.

929, the Manitowoc case, 140 Am. St. Rep. 1056, the Des Moines Waterworks case, 95 Iowa, 259, and even the distinction drawn in the Selkirk case, 176 N. W. 301.

The Ottumwa Railway and Light case did not involve the same statute, the facts were entirely different, it was decided after the case at bar, and a rehearing has been allowed in that case set for January 14, 1921, when it will be heard by a court of seven consisting of three new judges, the writer of the opinion having been eliminated from the court at the last election.

The Selkirk case was decided since the decision of the case at bar, and although the case at bar was cited on page 302 of the opinion in 176 N. W. the Court distinguished the cases in the following language:

> "In the Muscatine case the Light Company endeavored to change the rate fixed in the ordinance and charge a higher one, without the exercise by the city of its power to regulate and fix rates, and without the consent of the city."

That case was decided after the Town of Williams case, which was also an action by the city for a temporary injunction, in which the court merely decided that the claim was not so unreasonable, or so clearly untenable, that the court should refuse to preserve the status on the theory that the defendant is clearly not entitled to relief on final hearing.

The writer of the opinion in the Selkirk case says:

"Appellant cites and relies on Columbus

Railway, Power & Light Co. vs. City of Columbus (D. C.) 253 Fed. 499.

"Muscatine Light Co. vs. City of Muscatine (D. C.) 256 Fed. 929, and a memorandum and decree in another case not reported. The Columbus case arose under the statutes and law of Ohio, and the decision follows the rule laid down in Ohio, **which seems to be contrary to the general rule**, and is contrary to our own decisions. There is this further fact in that case, that the company was attempting to raise rates without the consent of the city council."

No authorities are cited in support of either proposition, and it is evident that the court was not fully advised either as to the general rule or the previous decisions in Iowa.

The Columbus case had then been affirmed by this Court, having been decided April 14, 1919, and reported in 39 Sup. Ct. Rep. 349. The opinion in the Selkirk case was filed Feb. 16, 1920, but no reference was made in that opinion to the decision of this Court in the Columbus case.

DIVISION SEVEN

The case of Knoxville Gas Co. vs. Knoxville, (C. C. A.) 261 Fed. 283, is not applicable to the facts in the case at bar for the following reasons:

1. The Court, in the first paragraph of the opinion says:

"The controlling question is whether in 1903 the city of Knoxville possessed the power by contract irrevocably to fix the maximum

price of gas for a term of fifty years. The decision was based on the Statutes of Tennessee and the Court held that authority had not been given by the state legislature authorizing the city of Knoxville to make such a contract."

2. The Court also said:

"Authority to make prices by contract, or even by way of regulation, touching the supply of gas, is nowhere expressed among the municipal powers. Thus the claim of power in the city to agree upon a price for gas supplied throughout the life of the ordinances of 1903, must at last rest on the right created in the city in general language to impose terms and conditions of its consent to use the highways, rather than upon language specifically authorizing it either to regulate prices or to agree upon a price. The effect of such a claim is to ask that there be read into the statutes language which the legislature did not see fit to enact."

In the case at bar both counsel for appellant, and the latest dictum of the Iowa Supreme Court in the Town of Woodward case, so much relied on by appellant, concede that the power to fix rates expressly existed, and their contention is that Chapter 16 of the 22d G. A. took away that power.

In the Home Telephone Co. vs. Los Angeles, 211 U. S. 265, 29 Sup. Ct. Rep. 50, the facts were entirely different from those in the case at bar.

The franchise was granted by an ordinance for fifty years, which is to be enjoyed in accordance with terms and conditions named, stipulates for cer-

tain free service for the city, and the payment to it, after five years, of 2 per cent of the gross receipts, and provides that the charges for service shall not exceed specified amounts.

This ordinance reserved to the city council the power, by ordinance, to regulate, and fix and determine the price of gas, telephones, etc., provided by the Statute of California.

The Court said:

> "This ordinance, enacted by the city council, which exercises the legislative and business powers of the city, and, as has been shown, the charter power of regulating telephone service and of fixing the charges, contains, it is contended, the contract whose obligation the subsequent ordinances fixing lower rates impaired. Two questions obviously arise here. Did the city council have the power to enter into a contract fixing, **unalterably**, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter powers of regulations?"

In that case the city council had, subsequent to the franchise ordinance, enacted an ordinance reducing the rates fixed in the franchise ordinance. It was this reduction in the price or rates of telephone service that appellant, the Telephone company, claimed impaired the original contract contained in the franchise ordinance. This Court sustained the lower court in holding that there was no impairment of any contract right of the Telephone company. This language was used:

> "The appellant has failed to show that the city had legislative authority to make a contract of exemption from the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract is fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore denied."

The decision sustained the contention of the city that it had power to regulate rates, and does not in any manner conflict with our contention in the case at bar. It is also in perfect harmony with the decision of this Court in the Cedar Rapids Gas case, which involved the very statute now being questioned, and in which this Court, since that decision, said:

> "It is true that the contract was in the form of an ordinance, but the ordinance was drawn as a contract, to be accepted, and it was accepted by the plaintiff; it contained reciprocal undertakings, the one in question being that of the plaintiff, as we have said; and it was subject to the power retained by the city to regulate rates."

This Court, in the Home Telephone case did not find it necessary to determine whether or not it was intended in the franchise ordinance to fix the rates in such a manner that they could not be afterwards readjusted by the city council in its legislative capacity to regulate rates, and did not decide that question. There are no adjudicated cases, so far as

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we have been able to find, holding that language used by the grantee of the franchise, agreeing to furnish service at rates specified for a specified period, subject to the power retained by the city council, can be construed as prohibiting the exercise of such power of regulation.

There are cases to the contrary, however.

See Waterworks Co. vs. City of Creston, 101 Iowa, on page 689, wherein the Supreme Court of Iowa, said:

> "Appellant's next contention is that the contract is void, in that it attempts to exclude future regulation." * * * * *
>
> "The ordinance grants to appellee the right to charge and collect, during the continuance of the privilege, from consumers, the rates specified, 'or other rates that may be established by the grantee and approved by said council.' By this ordinance the city council established the rates therein specified, and have not since established any other or different rates. * * * It is insisted that because of the provision in the contract as to rates, the contract should be declared void. The contract contemplates that a change may be made in the rates, and the law authorizes it. To sustain the contract is to permit the parties to go on under it, and enjoy just what each has contracted for, while to overthrow it would be to render practically valueless the large investment which appellee has made, and deprive appellant of just what it needs and has. Surely, every equitable consideration is against such a result. What we have said disposes of

appellant's contention that the rates, being for twenty-five years, are unreasonable."

To the same effect is Ft. Smith Light & Traction Co. vs. City of Ft. Smith, 202 Fed. 581, and Knoxville Water Co. vs. Knoxville, 189 U. S. 434. Also see Iowa Railway & Light Co. vs. Jones Auto Company, 182 Iowa, on page 990, wherein the Supreme Court of Iowa, said:

> "And the rates for service therein specified are subject to subsequent adjustment as this may be deemed expedient or necessary by the city council."

The case of San Antonio Public Service Co, vs. City of San Antonio, 257 Fed. 467, is not in conflict with these cases, but contains this very pertinent statement:

> "It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences slight in themselves may, through their relation with other facts, turn the balance one way or the other. Illustrations of the truth of this may be found in the cases of Freeport Water Co. vs. Freeport City, supra, Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702, and Knoxville Water Co. vs. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887, where no authorized contract was found, as contrasted with Detroit vs. Detroit Citizens' St. Ry. Co. supra, and Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48

L. Ed. 1102, where a contrary conclusion was reached."

DIVISION EIGHT

We have no quarrel with appellant in regard to the law contended for in its Division Eight proposition.

We concede that the exercise of the power conferred by Section 725 is legislative exercise, and that it is continuous so that one city council may not bind itself or any succeeding council from exercising such power.

But, we fail to see any room for the application of such doctrine to any of appellant's contentions in this case.

In the first place, being legislative, the exercise of such power of the city council to regulate rates is not subject to control by the courts.

In the next pace no attempt has been made by the city council to either bind itself, or any other council, for any definite length of time, but the utility company has bound itself, as one of the conditions upon which it received and claims the right to still exercise the privileges of the franchise, that the rates specified shall continue for three years, subject to the power of the city council to re-adjust such rates when it may deem such re-adjustment expedient or necessary.

We do, however, in this connection, wish to suggest that, if there could, by any manner of contortion of the language used in the franchise, be deducted any doubt on the question of whether or not the city intended to exclude the future exercise of the power to regulate, such language should be

construed most strongly in favor of the city and against the utility company. See:

People vs. Detroit United Ry., 162 Mich. 460, 125 N. W. 700, 127 N. W. 748, 139 Am. St. Rep. 582.

Township of West Bloomfield vs. Detroit U. Ry., 146 Mich. 198, 117 Am. St. Rep. 628, 109 N. W. 258.

Peterson vs. Tacoma Railway & Power Co., 60 Wash. 406, 111 Pac. 338, 140 Am. St. Rep. 936.

McQuillan on Municipal Ordinances, Sec. 578.

9 Cyc. 588.

Des Moines Waterworks Co. vs. Des Moines, 95 Iowa, 348, 64 N. W. 269.

St. etc. R. Co. vs. Houck, 120 Mo. App. 634, 97 S. W. 963.

Illinois Cent. R. Co. vs. Chicago, 176 U. S. 646, 20 Sup. Ct. Rep. 509, 44 L. Ed. 622.

In the Peterson case, 140, Am. St. Rep. reading from page 941, we find this statement:

> "It will be seen under this authority that, if we found the contract to be doubtful, it would be our duty to resolve it in favor of the city, for franchises are to be construed in favor of the public, unless controlled by law or saving clauses of the contract."

We also find in 13 Corpus Juris on page 539, this statement:

"Where a particular word or words, or the contract as a whole is susceptible of two meanings, one of which will uphold the contract or render it valid and the other of which will destroy it or render it invalid, the former will be adopted so as to uphold the contract. So a contract should be construed in favor of mutuality and of certainty.

"507 b. Construction as Legal rather than Illegal.

"So where one construction will make the contract legal and another will make it contrary to law or public policy, the former construction will be adopted, if reasonable; but in order to uphold the validity of the contract, the court cannot do violence to the plain meaning of the words."

See also:

U. S. vs. Central Pac. R. Co., 118 U. S. 235, 6 Sup. Ct. 1038, 30 L. Ed. 173.

Hobbs vs. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940.

Cole vs. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 N. W. 746, 18 L. R. A. (N. S.) 1161.

DIVISION NINE

We do not agree with the statement that "Neither the defendant city or the plaintiff company was bound by the rates for the three-year term." We claim that each was bound by such

rates, subject to the power of the city council to re-adjust them at any time such body might deem such re-adjustment expedient or necessary.

DIVISION TEN

There is no want of mutuality, even if we base the decision strictly on contract, and waive, for the purpose of argument, the condition upon which the grant was made proposition.

In the Iowa Railway & Light Co. vs. Jones Auto Co. case, cited by appellant, we find nothing to support the contention of lack of mutuality, but quite on the contrary we find this statement:

> "The authority to regulate and fix rates of compensation is not limited to reducing these. It includes the power to increase as well, and the city council may decrease or increase as may be necessary in determining those that shall be just and reasonable. Nor is it essential that change of rates by the city council shall rest upon some additional consideration. It is enough that the law has empowered that body to regulate and fix rates to be exacted, and the conditions of the franchise, with such authority reserved, are sufficient consideration, if any were necessary. At the time Ordinance 98 was enacted, Section 720 of the Code contained no provision for the amendment of the franchise, and counsel for appellant contend on that ground that it is invalid. But a re-adjustment of rates of compensation in no manner involves an amendment of the charter of the company, for that, as seen, through the

statute, which must be read into the ordinance, granting the franchise authorizes the regulation and fixing of such rates by the city council at any time. It is one of the things the franchise authorizes to be done thereunder, and in so doing, the franchise is not amended, but its terms carried out. The method of regulation and fixing rates is not prescribed, and this being so, it was competent for the city council to exercise in its own way the power conferred."

Another citation of appellant, 13 Corpus Juris, 332, is contrary to its contention, as follows:

"And, conversely, a contract is not unilateral where it contains mutual obligations binding on both parties. Mutuality does not require that both engagements must be expressed in the same form, for one may be in writing and the other by parol. The benefits or liabilities of the parties need not be equal. It is sufficient that a consideration move to both parties, and mutual promises are not essential where a sufficient consideration is otherwise present. Where there are mutual promises between the parties, it is not necessary to render a particular promise by one party binding that there be a special promise on the part of the other party directed to that particular obligation."

DIVISION ELEVEN

Appellant's contention under this division, as we read the decisions, is not sustained by the authorities cited.

Or, in other words, the authorities cited are not applicable to the facts in this case, and hence do not sustain its contention.

In the Chariton Telephone case, first cited, 173 Iowa, 497, the holding of the court was that the telephone company was not estopped from claiming its rights under the state law from the mere fact that it had secured the passage and had accepted a franchise ordinance when the city had no power to enact the ordinance in question. The ordinance was held absolutely void and no rights were claimed under it by the telephone company. That company claimed only its rights under the state law regardless of the void ordinance. In the case at bar the gas company has no rights under the state law independent of the ordinance. Without the franchise ordinance it has no right to use the streets of the city. Hence, it seeks to retain the benefits of the ordinance and repudiate the conditions.

To the same effect is Chamberlain vs. Iowa Tel. Co., 119 Iowa, 619.

In that case it was held that a telephone company could occupy the streets, prior to 1897, without any express grant of that right by the municipality.

Doyle vs. Wilcockson, 184 Iowa, merely re-affirms the same proposition.

Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 241, not only does not support appellant's contentions, but is squarely against them.

In that case the City of Cedar Rapids granted the water company an exclusive franchise for twenty-five years, with equal right thereafter with others, of furnishing the city with water supply. This grant was made on February 19, 1875.

On June 8, 1900, the city council passed an ordinance fixing a schedule of rates.

After the passage of the ordinance of June 8, 1900, the water company commenced an action in equity to restrain the enforcement of this ordinance fixing rates. It alleging that the rates so fixed are not compensatory, and are wholly insufficient to pay necessary expenses and charges and return any adequate or reasonable profit upon the investment made in the works, and that said ordinance is therefore unreasonable, and has the direct effect to deprive plaintiff of its property without due process of law, and to deny to plaintiff the equal protection of the law, in violation of the fourteenth amendment to the Constitution of the United States.

The District court sustained these contentions and entered a decree as prayed, but this decree was reversed by the Supreme court.

Justice Weaver, in the opinion of the Supreme court, said:

> "Under the ordinance of 1875 the plaintiff obtained a privilege which may properly be called a 'franchise,' in the common acceptance of that term; that is, the right or privilege of supplying the city of Cedar Rapids and its inhabitants with water, and of occupying the streets of the city for that purpose. It must be said, however, that plaintiff's privilege of supplying the city with water is not, in the strict sense of the word, a 'corporate franchise;' that is, it is not a privilege derived from or obtained by the act of incorporation. Its charter rights and privileges are such only as come to it through its organization under the general

corporation law, and did not and could not include the right to furnish water to the defendant city. Such right could only be acquired after the incorporation was accomplished, and by the agreement and consent of the city. True, the grant of corporate capacity was from the state, and the subsequent grant from the city may be said theoretically to have been also from the state. But the city was under no legal obligation to make the grant, and might have refused it without in any manner affecting the plaintiff's corporate rights, powers, or franchises. By making the grant it gave the plaintiff what may be called an 'additional franchise or privilege.' See Bridge Co. vs. Prange, 35 Mich. 400 (24 Am. Rep. 585). And like other franchises, it constituted a contract between the parties, having in general the same incidents and subject to the same interpretation which would obtain between other contracting parties."

Later in the same opinion we find this statement:

"But it is to be remembered that the grant of the franchise and its acceptance constitute a contract between the parties, and we think it has never been held that contract rights and obligations thus arising may not be considered and adjudicated by the courts in the same manner and by the same proceedings which obtain between litigants in general. * * * The corporation is the moving party, and comes into court asserting that by reason of the contract

with the city, as indicated by the grant of 1875, it has the right to furnish the city water supply upon certain terms, and, alleging that such right has been violated by a certain ordinance regulating its schedule of rates, it asks that the enforcement of such ordinance be enjoined. Such being the case, there is no good reason why the other party to the contract may not allege that the grant has expired, and that the contract, as such, has no longer any vital force or effect."

Again in the same opinion we find this statement:

"A person dealing with a municipal corporation is held to know the extent of the power of such corporation, and, if with such knowledge, he obtains a grant for which there is no legal authority, or is in violation of an express statute, he does so at his peril, and obtains no right which is enforceable in the courts. * * * * It follows of necessity from these principles, if not, indeed, as a matter of sound public policy, that a contract or grant made by a municipal corporation without any authority of law, and accepted by the grantee with full knowledge of its unlawful character, cannot be held to give color of right to the privilege thus attempted to be granted. To hold that color of right is to be thus obtained is to enable city officials to ignore with impunity every statutory limitation upon municipal power, and impose upon the people burdens which the law expressly provides shall never be created. The case of State vs. City of Des Moines, 96 Iowa, 521, re-

lied upon by plaintiff as supporting its claim to a colorable franchise, is easily distinguished from the one before us. We there pointed out the same distinction which we here emphasize between a lawful act irregularly accomplished and one for which no authority exists."

And again:

"A different rule sometimes obtains when the power to contract exists, but has been defectively or irregularly executed; but if the authority to do the act or make the contract is expressly withheld or denied by law, that fact may always be set up as a defense to an action brought thereon."

And again:

"Plaintiff entered into a contract having a definite limit, and with knowledge of the city's lawful right to insist that the limit be observed, and if by any mistake of judgment on its own part or by the exercise of any lawful power on part of the city the enterprise has proved unprofitable, it is not a ground for relief at the hands of the court. The fact that the exercise of a lawful power by the city may affect the value of plaintiff's property is also, in itself, immaterial." * * *

"Has the city any power to prescribe or regulate the plaintiff's rates for water service? The statute which authorized the granting of the franchise (Code 1873, Section 473) also provided that the company might be authorized

to charge and collect such rates 'as may be agreed upon between the company and the city.' We do not think, however, that plaintiff's right to collect rates was thereby necessarily left dependent upon an agreement which might never be arrived at. City of Des Moines vs. Des Moines Waterworks Co., 95 Iowa, 348. The effect of the statute is little, if anything, more than a recognition of the right which already existed at common law, — the right to charge and receive reasonable compensation for services performed. In view of the fact that we hold the franchise to have expired at the end of twenty-five years, it is unnecessary to go into any discussion of the power of the city to establish a schedule of maximum rates during the term."

In that case the Court said the illegal part of the contract, that is, that which provided for more than a twenty-five year period was separable from the grant for twenty-five years, if the plaintiff's theory that the words "and an equal right thereafter with all others" were intended as the grant of a franchise beyond the period of twenty-five years.

"We think, however, it is not a violent rendering of the language to construe it simply as an undertaking that the water company shall have an equal opportunity with others in competing for a new franchise when the original exclusive grant for the twenty-five years has expired."

Under this construction there was nothing illegal in the contract. But, however this may be, even under the theory that there was a grant for

more than twenty-five years intended. There could be a separation of the illegal part from the legal part without disturbing the rights of the public.

But, in the case at bar there can be no separating the condition as to rates from the other parts of the contract. If the rate provision is eliminated, then the moving cause upon which the members of the council and the voters at the election consented to the grant would be eliminated. This, as stated by Justice Weaver in the case above referred to, would "impose upon the people burdens which the law expressly provides shall never be created." It would impose upon the people a franchise ordinance giving to the utility company rights and privileges which would never have been conferred but for the condition providing for the rates to be charged, subject to the future exercise by the city council of the right to re-adjust. And, as also said in the same case. "Such right could only be acquired after incorporation was accomplished, and by the agreement and consent of the city." It is fundamental that such consent, obtained upon a false, or illegal promise, cannot be made the basis of any rights or privileges so obtained.

Appellant's contention that the provisions of the ordinance contract are separable is untenable.

In 13 Corpus Juris, 513, we find this statement:

> "If any part of a single consideration for one or more promises is illegal, or if there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which

part or which one of the considerations induced the promise, this rule being enunciated by statute in some jurisdictions."

And on page 515 of the same work we find this statement:

"RENUNCIATION OF ILLEGAL PART. When an entire contract is illegal in part, a recovery cannot be had thereon by a renunciation of the illegal part."

This proposition is made directly applicable to contracts or franchise ordinances, of the character in the case at bar, in the case of Waterworks Co. vs. City of Creston, 101 Iowa, 687, wherein it is said:

"It is insisted that because of the provision in the contract as to rates the contract should be declared void. The contract contemplates that a change may be made in the rates, and the law authorizes it. To sustain this contract is to permit the parties to go on under it, and enjoy just what each has contracted for, while to overthrow it would be to render practically valueless the large investment which appellee has made, and deprive appellant of just what it needs and has."

Furthermore, it is well established that contracts of the character now under consideration are not open to the construction contended for by appellant. They do not purport to limit or abridge the power of the city council to make future regulation.

This proposition is not only established by the case last above referred to from the Iowa Supreme Court, but is well established generally.

In Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 21 Sup. Ct. Rep. 490, this Court said:

> "There is no stipulation that it will be the only instance of regulation; that the power to do so is bartered away; and that the condition which determined and justified it in 1888 would remain standing, and continue to justify it through the changes of thirty years. It would require clearer language to authorize us in so holding."

Previously in the same opinion we find this statement:

> "A strict construction must be exercised. The contract claimed concerned governmental functions, and such functions cannot be held to have been stipulated away by doubtful or ambiguous language."

In Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. Rep. 493, this Court said:

> "Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain waterworks 'at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.' The words, 'as fixed by

ordinance,' may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time."

Again, in the same opinion, we find this statement:

"Of the second ground it is only necessary to say that the statutes of 1872 gave to the city the power to fix the rates. It became a condition, therefore, of the privileges granted to plaintiff."

The case of Pioneer Telephone & Telegraph Co. vs. State, 127 Pac. 1073, cited and relied upon by appellant, is not in point.

In that case the matter came before the Supreme Court of Oklahoma on an appeal by the Telephone company from an order of the Corporation Commission imposing a fine for violation of an order of the Commission regarding rates.

The inapplicability of that case to the case at bar is apparent. We do not claim that the Commission, City Council, Legislature, or whatever body happens to be endowed with the power to regulate rates, cannot do so. We claim they can do so. That nothing can hinder them from doing so. That in Iowa the City Council, who happens to be endowed

with that power, can always and at all times re-adjust rates whenever such re-adjustment is by the city council deemed expedient or necessary. That cities cannot contract away this power to re-adjust rates. That the city council in the case at bar did not attempt to do so. That the language used in the contract of the franchise ordinance cannot be construed as such an attempt. That if it could be so construed, it can also be construed consistently with the continued exercise of the power to re-adjust, as said in the Freeport case, and that of the two possible constructions the one permitting the continued exercise of the power must be adopted, according to that decision.

We therefore respectfully submit that the city council, and each and all of the respective defendants, have done nothing to either deprive appellant of any of their property without due process of law, confiscate any of their property, or deprive them of the equal protection of the laws, and that their Bill of Complaint was properly dismissed.

Respectfully submitted,

_____

.....

X. C. NADY,
RALPH H. MUNRO,
Attorneys for Appellee.

Service of the within Brief and Argument and receipt of copies is acknowledged this.....day of January, 1921.

.....

.....

.....

Counsel for Appellants.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 190

MUSCATINE LIGHTING COMPANY, APPELLANT,

vs.

CITY OF MUSCATINE, IOWA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED OCTOBER 24, 1910.

(27,333)

(27,333)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 578.

MUSCATINE LIGHTING COMPANY, APPELLANT,

vs.

CITY OF MUSCATINE, IOWA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Caption	a	1
Citation	1	1
Bill of complaint	3	2
Exhibit "A"—Gas ordinance approved April 29, 1914	18	12
Exhibit "B"—Ordinance approved March 17, 1904	23	14
Amended and substituted answer	26	19
Exhibit 1—Gas ordinance approved December 18, 1913	46	32
2—Proposition of Muscatine Lighting Co. to City Council of Muscatine, Iowa	48	33
3—Ordinance approved April 29, 1914, for electrical lighting	51	34
4—Contract for street lighting	53	36
5—Gas ordinance approved April 29, 1914	56	37
Admissions	59	39
Testimony of Ihm Sullivan	60	40
Decree	65	43
Petition for appeal and order allowing same	68	44
Assignment of errors	70	44
Bond on appeal	74	47
Praecipe for transcript	77	48
Clerk's certificate to transcript	79	50

Rudd & Detweiler (Inc.), Printers, Washington, D. C., February 16, 1920.

a Pleas and Proceedings before Honorable Martin J. Wade, Judge of the District Court of the United States for the Southern District of Iowa, in a Certain Cause Lately Pending in the Davenport Division of said Court, at Davenport, Iowa, Being Numbered 4020, Equity, Wherein Muscatine Lighting Company is Complainant and City of Muscatine, Iowa, et al. are Defendants.

Appearances:

Lane & Waterman, Davenport, Ia.;
E. M. Warner, Muscatine, Ia.;
Wm. Chamberlain, Cedar Rapids, Ia.,
Attorneys for Complainant.
Ralph U. Thompson, Muscatine, Ia.;
Hoffman & Hoffman, Muscatine, Ia.;
H. G. Thompson, Muscatine, Ia.;
Attorneys for Defendants.

Wm. C. McArthur, Clerk, P. O. Des Moines, Ia.

1 *Citation.*

United States of America to City of Muscatine, Iowa; R. S. McNutt, Mayor of said City of Muscatine, Iowa; John A. Vetter, William F. Hathaway, William H. Graff, William Cochran, Joe B. Miller, H. F. Meyers, John S. Nietzel and Sidney Terry, Members of the Council of said City of Muscatine, Iowa, and Ralph U. Thompson, City Attorney of the City of Muscatine, Iowa, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, D. C. Thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the District Court of the United States for the Southern District of Iowa wherein Muscatine Lighting Company is Appellant and you are Appellee, to show cause, if any there be, why the Decree rendered against the said Muscatine Lighting Company as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Martin J. Wade, Judge of the District Court of the United States for the Southern District of Iowa this 20th day of September, A. D. 1919.

MARTIN J. WADE,
Judge of U. S. District Court,
Southern District of Iowa.

Due and legal service of the above Citation is hereby accepted and the receipt of a copy thereof is hereby acknowledged this 20th day of September, A. D. 1919.

RALPH U. THOMPSON,
HERBERT G. THOMPSON AND
HOFFMAN & HOFFMAN,
Attorney- for Appellees.

2 Be it remembered that on the 29th day of July, A. D. 1918, there was filed in the case of Muscatine Lighting Company, Complainant vs. City of Muscatine, Iowa, et al., Defendants, No. 4020 Equity, Davenport Division, a Bill of Complaint which is in words and figures as follows to-wit:

3 In the District Court of the United States in and for the Southern District of Iowa, Davenport Division, October Term, 1918.

#4020, Eq.

MUSCATINE LIGHTING COMPANY, Plaintiff,

vs.

CITY OF MUSCATINE, IOWA; R. S. MCNUTT, Mayor of Said City of Muscatine, Iowa; John A. Vetter, William F. Hathaway, William H. Graff, William Cochran, Joe B. Miller, H. F. Meyers, John S. Nietzel and Sidney Terry, Members of the Council of said City of Muscatine, Iowa, and Ralph U. Thompson, City Solicitor of the City of Muscatine, Iowa, Defendants.

Bill of Complaint.

Filed July 29, 1918. Wm. C. McArthur, Clerk, by Lura Parker, Deputy.

To the Honorable Judge of the District Court of the United States in and for the Southern District of Iowa:

The Muscatine Lighting Company, a corporation created, organized and existing under and by virtue of the laws of the State of Iowa for the purpose of engaging in the manufacture and sale of gas in the City of Muscatine, Iowa, and a citizen of the State of Iowa, having its principal office and place of business in the City of Muscatine, Iowa, brings this its Bill of Complaint against the City of Muscatine, Iowa, R. S. McNutt, Mayor of said City of Muscatine, Iowa; John A. Vetter, William F. Hathaway, William H. Graff, William Cochran, Joe B. Miller, H. F. Meyers, John S. Nietzel and Sidney Terry, members of the Council of said City of Muscatine, Iowa, and Ralph U. Thompson City Solicitor of the City of Muscatine, Iowa, defendants, and thereupon your plaintiff complains and says:

4

Paragraph One.

That the City of Muscatine, Iowa, is a Municipal Corporation organized and acting under the laws of the State of Iowa, and having a Special Charter from the State of Iowa, and all legislative and executive powers of such Municipal Corporation are vested in and exercised by a Council consisting of a Mayor and Eight Aldermen. The defendant, R. S. McNutt is the duly elected, qualified and acting Mayor; the defendants, John A. Vetter, William F. Hathaway, William H. Graff, William Cochran, Joe B. Miller, H. P. Meyers, John S. Nietzel, Sidney Terry are the duly elected, qualified and acting Aldermen; and the said Mayor and Aldermen, together organized and acting as such constitute the City Council of the City of Muscatine. The defendant, Ralph U. Thompson, is the duly appointed, qualified and acting City Solicitor of the said City, and as such is the lawful head of the Legal Department thereof, and charged with the duty of enforcing the City Ordinances and instituting prosecutions for violations thereof.

Paragraph Two.

This is an action brought by plaintiff against defendants, to enjoin the enforcement of the certain Ordinance of the defendant City passed and approved on the 29th day of April, 1914, fixing certain maximum rates to be charged therein for gas on or after the date of the passage thereof. Said Ordinance, a true copy of which is attached hereto marked Exhibit "A," and by this reference made a part hereof, was duly passed and published by the City Council of said City on or about the 29th day of April, 1914, and has never been modified and repealed.

5 The amount involved in the controversy herein, exclusive of interest and costs exceeds the sum of Three Thousand Dollars ($3,000.00) and the determination of this controversy involves the construction of certain Provisions of the Constitution of the United States, to-wit:

(1) Section Ten, Article One of the Constitution of the United States prohibiting the passage by any State of a law impairing the obligation of a Contract.

(2) The Fifth Amendment to the Constitution of the United States prohibiting the taking of private property for public use without just compensation therefor, and prohibiting the taking of private property without due process of law.

(3) Section One of the Fourteenth Amendment to the Constitution of the United States guaranteeing to all citizens of the United States equal protection of the law, and that portion of Section One of said Amendment which provides that no State shall deprive any person of life, liberty or property without due process of law.

Paragraph Three.

On or about the 17th day of March, 1904, the defendant City acting through its legally constituted authority, did by Ordinance duly and legally passed and adopted by said authorities a true copy of which is hereto attached marked Exhibit "B", and by this reference made a part hereof, grant to Citizens Railway & Light Company, its successors and assigns, a certain franchise or license authorizing and empowering the said Citizens Railway & Light Company, its successors and assigns to own, construct, operate and maintain a gas plant and system for the distribution of gas in the City of Muscatine, Iowa, for a period of Twenty-five years from and after the
6 17th day of March 1904, and under certain terms and conditions specified therein, to use the streets and avenues, alleys and other public places for such purposes. That at the time of the adoption of said franchise ordinance and in accordance with the terms thereof, the Citizens Railway & Light Company for itself, its successors and assigns duly accepted the said ordinance and franchise. That thereafter on or about the Ninth day of July, 1912, the said Citizens Railway & Light Company sold, transferred and assigned unto the plaintiff, Muscatine Lighting Company, all of its property real and personal, and including its said franchise granted by the City of Muscatine aforesaid. That acting under the license and authorization of the said franchise, the Grantee and its successors and assigns this plaintiff, constructed and have continued and now are operating a gas works and plant and distributing system for supplying the City of Muscatine and the inhabitants thereof with gas service both for illuminating and heating purposes, which said plant and distribution system necessitated the expenditure of large sums of money by said Grantee and this Plaintiff. That said franchise ordinance and the written acceptance thereof became a lawful contract in writing by and between the said City of Muscatine, Iowa, and the said Citizens Railway & Light Company, its successors and assigns, and the same now constitutes such a lawful contract by and between the City of Muscatine and your plaintiff as the lawful successor and assignee of said Citizens Railway & Light Company.

That under and by virtue of the terms of this contract and of the laws of the State of Iowa and of the United States at the time of the execution of said contract and at the present time, your plaintiff is entitled to charge such rate for the gas sold by it to its consumers in said City, as will enable it to pay therefrom operating expenses and taxes, and such sum for depreciation in the value of its
7 property used and useful in rendering such service, whether from natural wear or tear, obsolescence or inadequacy occasioned by the growth of said City or from any other natural causes whatsoever connected with the use thereof, and in addition thereto yield to plaintiff a fair and reasonable rate of return upon the fair and reasonable value of such used and useful property employed in rendering such service.

Paragraph Four.

That since the granting and acceptance of said franchise and in reliance thereupon and pursuant to the terms thereof, the said Grantee, Citizens Railway & Light Company, its successors and assigns, have maintained a good and sufficient gas plant within the City of Muscatine, and have built and constructed mains and other necessary apparatus and equipment in and along and upon the streets, avenues, alleys and other public places in said City, and expended and invested large sums of money in so doing. That at the present time the fair and reasonable value of the used and useful property necessarily employed by plaintiff in complying with the terms of its franchise and contract, and in furnishing the gas required by the City of Muscatine and its inhabitants and industries therein, is in excess of Three Hundred Fifty Thousand Dollars ($350,000.00).

Paragraph Five.

That on or about the 29th day of April, 1914, the defendant City, acting through its legally constituted authorities, the Mayor and City Council thereof, passed a certain ordinance a copy of which is hereto attached marked Exhibit "A", and by this reference made a part hereof. That under the said ordinance the defendant City attempted to fix the maximum rate that might be charged by this plaintiff to the inhabitants of the City of Muscatine for gas furnished so that the rate authorized by said ordinance to be
8 charged and now in force by order of the City authorities in the City of Muscatine is the sum of One Dollar and Two cents ($1.02) per thousand cubic feet net.

Plaintiff states that since the passage of said ordinance and upon the demand of the City of Muscatine through its authorized representatives, this plaintiff has been furnishing and charging for gas furnished to the inhabitants and consumers of Muscatine at the rate and price as fixed in said ordinance.

Paragraph Six.

That the actual gross earnings, operating expenses and taxes, exclusive of depreciation and the net earnings of plaintiff in the conduct of its said business of furnishing gas to the City and inhabitants of the City of Muscatine since the fixing of said rates under the ordinance of April 29, 1914, hereinbefore set forth, to-wit, for the calendar years 1914, 1915, 1916 and 1917 at the rates of charge set forth in said ordinance "Exhibit A" (including, however, in the first calendar year the earnings and expenses for the months of January, February and March in 1914 at the higher rates then in

force, to-wit One Dollar and Twenty-five Cents ($1.25) net have been as follows, to-wit:

Year 1914:

Gross Earnings	$52,470.45
Gross operating expenses and taxes (exclusive of depreciation)	35,003.99
Net earnings including depreciation	$17,466.46

Year 1915:

Gross earnings	$45,660.53
Gross operating expenses and taxes (exclusive of depreciation)	28,858.14
Net earnings including depreciation	$16,802.39

Year 1916:

Gross earnings	$48,056.20
Gross operating expenses and taxes (exclusive of depreciation)	31,521.61
Net earnings including depreciation	$16,534.59

9 Year 1917:

Gross earnings	$54,430.12
Gross operating expenses and taxes (exclusive of depreciation)	43,005.24
Net earnings including depreciation	$11,424.88

Paragraph Seven.

That from the net earnings including depreciation as shown in each of the years in the preceding paragraph hereof there must be deducted annually for normal depreciation of plaintiff's plant and property used and required in furnishing the supply of gas to the defendant City and the inhabitants thereof, including inadequacy, decay and obsolescence, a sum equal to Ten cents per thousand cubic feet of gas made, or the following sums per annum:

For the year 1914	$4,810.11
" " " 1915	4,158.08
" " " 1916	4,478.33
" " " 1917	5,302.98

Leaving as a net return upon the value of its used and useful property as hereinbefore alleged during that said period of time, the following sums per year:

For the year 1914.....$12,656.35

or interest at the rate of 3.8 per cent annually upon the actual value of plaintiff's property for that year.

For the year 1915..... $12,644.31

or interest at the rate of 3.69 per cent annually upon the actual value of plaintiff's property for that year.

For the year 1916..... $12,656.26

or interest at the rate of 3.44 per cent annually upon the actual value of plaintiff's property for that year.

For the year 1917..... $6,121.90

or interest at the rate of 1.72 per cent annually upon the actual value of plaintiff's property for that year.

10 Paragraph Eight.

That during the past two years the prices of gas, coal, oil, of all metals and all essential materials used and consumed in the manufacture and distribution of gas have increased exceedingly; the price of coke having increased from $5.48 a ton in 1916 to $11.25 a ton in 1918. The cost of oil has increased from .0395 per gallon in 1916 to .07 per gallon in 1918. The cost of coal has increased from $4.32 a ton in 1916 to $6.89 per ton in 1918. Metals and fire brick have increased during that same period more than One Hundred per cent. Labor has increased from Seventeen and one-half cents an hour to Thirty-five cents an hour in 1918. That the net income of this plaintiff during the latter part of the year 1916 and during the year 1917 does not reflect these increased costs of the materials entering into the manufacture and distribution of gas as this plaintiff had certain contracts outstanding and unexpired by reason of which it was able to purchase most of such materials at prices much under the then and now prevailing market prices, and plaintiff's consumers were given the entire benefit of these contracts. That practically all of said contracts have now expired and the plaintiff is compelled to operate its plant with fuel and supplies purchased at the present prevailing prices with the result that the operating income of this plaintiff from the sale of gas without deduction for depreciation has been very materially reduced in 1918 as against the showing made in 1917. That taking the known costs that the plaintiff is required to expend for the materials and labor that goes into the cost of production, and taking the volume of business estimated on the production of last year of its gas plant and property, and using the rate under the existing ordinance passed by the City of Muscatine and hereinbefore referred to, plaintiff states that
11 its entire revenue for the year 1918 from the sale of gas would be the sum of Fifty-one Thousand Dollars ($51,-

(000.00). That its operating expenses will be for this same period, the sum of Firty-four Thousand One Hundred Thirty-five Dollars ($54,135) leaving a net loss from operation of the sum of Three Thousand One Hundred and Thirty-Five Dollars ($3,135). These figures do not take into account or allow anything for depreciation.

Paragraph Eight and One-half.

Plaintiff further shows that it is unable to continue to operate its property and furnish the gas service under the rate so insisted upon and established by the authorities of the City of Muscatine, and it has therefore at this time refused to further furnish such service at said price, but has in fact established as the price to its customers that it must receive for gas, and the service to be furnished during the present continuation of this unusual and abnormal condition, the price and rate of One Dollar and Sixty-five Cents ($1.65) net per thousand cubic feet delivered to the consumer.

Your Petitioner shows that at this rate on the basis of sales as indicated by the business of 1918, the entire revenue for Twelve months would be the sum of Eighty-two Thousand Five Hundred Dollars ($82,000); that the necessary operating expenses and charges for the same period based upon the present actual expenses, costs and charges, would be the sum of Fifty-four Thousand One Hundred Thirty-five Dollars ($54,135), which would leave as a net operating result for said period as near as your Petitioner is able to determine at this time, Twenty-eight Thousand Three Hundred Sixty-Five Dollars ($28,365.00). This sum is without taking into account any amount for depreciation, obsolescence and charges of that character which are absolutely necessary, and a reasonable amount as representing such charge for said period applied to an estimated sales production of 50,000,000 cubic feet, and figured on the basis
12 of Ten Cents ($.10) per thousand cubic feet sold, would be the sum of Five Thousand Dollars ($5000), leaving after deducting and charging off such depreciation, the net sum of Twenty-three Thousand Three Hundred Sixty-five Dollars ($23,365), which said sum would represent an interest at the rate of Six and one-half per cent per annum on the actual value of your plaintiff's property as now constituted. Your Petitioner alleges that it will be impracticable, unjust and illegal to require, under the conditions now existing, your Petitioner to continue to operate its plant and furnish gas service as aforesaid to the citizens and people of Muscatine at a less rate than $1.65 per thousand cubic feet as sold and delivered.

Paragraph Nine.

Plaintiff further shows the Court that the legal rate of interest in the State of Iowa is six per cent (6%) per annum, and the usual, ordinary and going rate of interest in the City of Muscatine and surrounding territory upon loans to Companies of like credit as

this plaintiff, was for several years preceding the year 1914, not less than six per cent (6%) per annum, but that since said date, owing to the vast amount of money used in the war, it has advanced until such money cannot be procured under Nine and Ten per cent; that the usual and going rate of return demanded by the investors in such territory upon preferred stocks of companies of the same business risks and hazards as the plaintiff prior to the year 1916, was not less than eight per cent (8%) per annum, and that at the present time it is practically impossible to market such stocks at all at any rate of interest within the reasonable limits of plaintiff's business.

Plaintiff further shows the Court that it is now paying in excess of six per cent (6%) per annum for all money borrowed by it for the enlargement and extension of its properties during the past five years.

13

Paragraph Ten.

That the plaintiff has outstanding obligations due and to become due and upon which the interest is due and payable, and that unless plaintiff meets its payments of interest as the same shall become due upon its said indebtedness, it will be unable to extend or renew the same, and that plaintiff's property will be seized or a Receiver appointed, thus resulting in an enormous financial loss to this plaintiff and its stockholders.

Paragraph Eleven.

Your plaintiff further shows the Court that the said Ordinance of April 29th, 1914, of the defendant City is and should be held by this Honorable Court to be null and void, and of no force and effect whatsoever as against this plaintiff for the following reasons, to-wit:

(1). Because the said Ordinance, if enforced, would result in the impairment of a valid existing contract between plaintiff and the defendant City under the terms of which the plaintiff is at law guaranteed by the defendant City that it will at no time so reduce plaintiff's gas rates that it will not be permitted to earn a fair rate of return upon the fair and reasonable value of its property actually employed in rendering such gas service, whereas the rate so fixed in said Ordinance of April 29, 1914, will not yield plaintiff a fair return upon the value of its property, and will thus result in a complete and absolute confiscation of its property contrary to the terms of said contract and to the provisions of Section Ten (10) of Article One (1) of the Constitution of the United States.

(2). Because the Ordinance, if enforced, would result in the taking of plaintiff's property for public use without just compensation therefor, for the reason that under the rates fixed therein, it would be obliged to produce and furnish its gas to its consumers

in said City at less than the actual cost to plaintiff of such
14 gas and service, and the value of plaintiff's plant as such would thereby be destroyed, and the use and income thereof taken for public use contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

(3). That the enforcement of the Ordinance would result in the taking of plaintiff's private property without due process of law for all the reasons set forth in this Bill of Complaint, and particularly under the First and Second sub-divisions of this Paragraph contrary to the terms of the Fifth Amendment to the Constitution of the United States.

(4). That the enforcement of said Ordinance would result in denying to plaintiff the equal protection of the laws for all of the reasons set forth in this Bill of Complaint, and particularly under the First and Second sub-divisions of this Paragraph contrary to the terms of Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

Paragraph Twelve.

Your plaintiff further shows the Court that it has several thousand consumers of gas in the City of Muscatine, Iowa, and that the bills of a large portion of such consumers are for a small amount ranging from Fifty Cents to Three Dollars per month, and should Complainants comply with the Terms of said Ordinance of April 29, 1914, and said Ordinance should be by this Court declared to be null and void, it would in practically all cases be impossible for your plaintiff to collect the small sums then due it from the said consumers, for the reason that many of the consumers are transients, many others are judgment proof and in all cases the costs of collection for such small sums would be so great as to render such collection unprofitable and your plaintiff would vir-
15 tually be compelled to lose either through abandonment or cost of collection, the difference between the compensation now charged and the compensation provided for under said ordinance of April 29, 1914.

Paragraph Thirteen.

Your plaintiff further alleges that unless restrained by an Injunctive Writ of this Honorable Court, defendants will enforce the provisions of said illegal and invalid Ordinance by the institution of criminal prosecutions against this plaintiff, its officers and employees, the imposition of manifold grievous fines and penalties against this plaintiff and against its said officers and employees of such aggregate amount as to be unreasonable, unjust and oppressive, and will thus, by a multiplicity of suits, fines and penalties unjustly and unlawfully prevent this plaintiff from charging more than such Ordinance rates for gas furnished its consumers, and against such unjust, wrongful

and oppressive action upon the part of defendants, your plaintiff has no adequate remedy at law.

And for as much as your plaintiff can only have relief in a Court of Equity where matters of this nature are properly recognizable and reviewable, it has filed this bill of Complaint and prays that it be adjudged and decreed by this Honorable Court,

(1). That said Ordinance of April 29, 1914, of defendant City of Muscatine, Iowa, be adjudged and decreed to be null and void and of no force and effect whatsoever upon the grounds and for the reasons charged and alleged in this Bill of Complaint, and upon such other grounds and for such other reasons as may to this Honorable Judge seem just, reasonable and equitable, or as may by this Honorable Court be found to exist.

(2). That a temporary Writ of Injunction be issued pending the trial of this suit according to the course and practice, and out of and under the seal of this Honorable Court according to the Statute
16 . in such case made and provided, strictly enjoining and restraining the said defendants and each of them, and any and all persons whomsoever acting through or under said defendants, or independently of said defendants, from enforcing or attempting to enforce in any manner whatsoever the terms of said Ordinance of April 29, 1914, passed by the City of Muscatine, Iowa, as against your plaintiff or its officers or employees, or from instituting or prosecuting any civil or criminal action or proceeding against your plaintiff or its officers or employees for fines, forfeitures or penalties on account of the refusal of your plaintiff, its officers or employees to abide by the terms of said Ordinance until the final judgment and Decree of this Honorable Judge herein.

(3). That upon the rendition of final judgment and Decree herein, such Writ of Injunction be made permanent and perpetual.

(4). That plaintiff further prays for such other and further relief as the nature and circumstances of this case may require, and as to this Honorable Court may seem meet and proper.

(5). Your plaintiff further prays that your Honorable Court may grant unto your plaintiff a Writ of Subpena of the United States of America issued out of and under the seal of this Honorable Court directed to the City of Muscatine, Iowa, R. S. McNutt, John A. Vetter, William F. Hathaway, William H. Graff, William Cochran, Joe B. Miller, H. F. Meyers, John S. Nietzel, Sidney Terry and Ralph V. Thompson, defendants, herein, therein and thereby commanding the said City of Muscatine, Iowa, R. S. McNutt, John A. Vetter, William F. Hathaway, William H. Graff, William Cochran, Joe B. Miller, H. F. Meyers, John S. Nietzel, Sidney Terry and Ralph V. Thompson, defendants, at a certain time and under a certain penalty therein
17 to be named, personally to be and appear before this Honorable Court then and there to answer all and singular (but not under oath, answer under oath being hereby expressly waived) the matters aforesaid, and to stand and abide by and sustain such di-

rection and Decree as to your Honor may seem meet and just in the premises.

MUSCATINE LIGHTING COMPANY,
By LANE & WATERMAN,
E. M. WARNER,
WM. CHAMBERLAIN,
Solicitors.

STATE OF IOWA,
Scott County, ss:

C. N. Chubb being duly sworn, says he is General Manager of the Muscatine Lighting Company, the complainant herein; that he has read the foregoing Bill of Complaint and knows the contents thereof; that the averments therein contained are true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes such averments to be true.

This verification is made by deponent and not by complainant for the reason that complainant is a Corporation.

C. N. CHUBB.

Subscribed and sworn to before me by the said C. N. Chubb this 20th day of July, 1918.

[NOTARIAL SEAL.]

JOE R. LANE,
Notary Public, Scott County, Iowa.

18

EXHIBIT "A."

An Ordinance Fixing the Quality of Illuminating Gas and the Price to be Charged for the Same by Any Corporation, Firm, Partnership, or Person Furnishing the Same to Consumers Within the City of Muscatine, Iowa.

Be it Ordained by the City Council of the City of Muscatine.

Section I.

That any corporation, firm, partnership or person, or its successors or assigns, in supplying gas to the inhabitants of the City of Muscatine, Iowa, shall not charge to exceed One Dollar and Ten Cents ($1.10) per thousand cubic feet; providing, however, that said corporation, firm, partnership or person, may charge not to exceed One Dollar and Twenty Cents ($1.20) per thousand cubic feet of gas used by a consumer who does not pay his bill for said gas by the tenth day of the month succeeding that in which said gas is furnished.

It is further provided that the charge of $1.10 per thousand cubic feet net shall be reduced at the rate of two cents (2¢) per thousand cubic feet each year beginning May 1st, 1915, and continuing for a period of five (5) years, or until the rate is $1.00 per thousand cubic feet net.

Section II.

The gas to be furnished by any corporation, firm, partnership, or person to the inhabitants of the City of Muscatine, shall have an average gross heating value of Five Hundred and Ninety (590) British Thermal Unit*ed* per cubic foot, with an allowable variation of ten per cent (10%) over or under this figure. The test to determine the heating value aforesaid to be made at the Company's works
19 as the gas passes from such works into the distribution system. And that said test must be made whenever required by the City Council and the City shall have the right at any time to inspect and test said gas by a competent inspector appointed by the City.

Section III.

Be it further provided that said corporation, firm, partnership or person shall furnish to its consumers for measuring the gas to be used, proper meters free of charge; and further provided that said corporation, firm, partnership or person shall be authorized to charge to its consumers a minimum monthly charge of fifty cents (50¢) in those cases and instances where the consumer does not use in any one month, more than Fifty cents (50¢) worth of gas computed on the scale of prices hereinbefore mentioned; and said charge of fifty cents (50¢) shall include all meter charges.

Section IV.

It is further provided that in those cases where any consumer desires to close his premises for one month or more that said corporation, firm, partnership or person shall, upon written request from such consumer, remove the gas meter from such premises and reinstall the same upon written application by such consumer, without any charge for such removal or re-installation, and that during the period such meter is thus removed there shall be no minimum monthly charge collected by said company.

Section V.

Any corporation, firm, partnership or person violating any of the provisions of this ordinance, shall, upon conviction thereof, be pun-
20 ished by a fine of not less than Ten Dollars ($10.00) or more than One Hundred Dollars ($100).

Section VI.

This ordinance shall be effective for gas furnished from and after May 1st, 1914.

Section VII.

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Passed and approved this 29th day of April, 1914.

HARRY KERN,
Mayor of the City of Muscatine.

Attest:
H. B. CAPLE,
City Recorder.

21

EXHIBIT "B."

An Ordinance Granting to the Citizens' Railway & Light Company, its successors and assigns, the right to construct, operate and maintain, gas, electric light and power works, and to use the streets, alleys and public places for transmitting electricity and gas, and to sell the same for light, heat, fuel and power purposes in the City of Muscatine, Iowa.

Be it ordained by the City Council *to* the City of Muscatine:

Section 1. That there is hereby granted to the Citizens' Railway & Light Company, a corporation, its successors and assigns, (hereinafter called the Company), the right to construct, operate and maintain within the City of Muscatine, Iowa, gas, electric light and power works, together with the right to lay in, along and upon the streets, alleys and public places of said City, mains, pipes, fixtures and feeders; to erect poles, wires and other apparatus necessary to furnish said city and its inhabitants with gas and electric light and power, subject to all rights heretofore granted and subject to all the conditions and restrictions herein contained and to the ordinances of said city and the laws of the state of Iowa, for the period of twenty-five years from and after the adoption of this ordinance.

Section 2. The rights hereby granted are given by said city and accepted by said Company, its successors and assigns, upon the following express conditions:

First. That before said Company shall commence the work of laying any of the mains or pipes, or the erection or construction of any poles, wires, cables, or feeders, authorized under this ordinance, it shall file with the City engineer a written application specifying the streets, alleys, and public places or parts thereof, in which mains or pipes are desired to be placed, or upon which poles are desired to be erected, the size of such pipes and mains and size and height of poles; such application shall be accompanied by a map or plat showing the proposed location of the mains, pipes or poles with reference to the streets and alleys and the surface and lines thereof. If the proposed location, size or height of any such main, pipe or pole,

shall in the opinion of the city council, interfere with the reasonable and proper use and maintenance of any other main, pipe, conduit, sewer, manhole, pole or other structure upon or under the streets, alleys, or public places of said City, or is otherwise unsatisfactory to the City Council, it may order the city engineer to make the necessary and proper changes in such map, plat and specifications and after the approval of the same by the city council, the city engineer shall issue a permit to excavate in the streets and alleys, and to lay, erect and construct such pipes, mains, or poles in accordance with said corrected map, plat and specifications. No such work shall be commenced before the issuance of the permit herein provided for.

Second. In the construction, location, erection or laying of any main, pipe, pole, post or other appurtenance or appliance authorized by this ordinance, no excavation or obstruction shall be unnecessarily made, placed or continued, and any excavation or obstruction made or placed in any street, alley, or public place at any time or for any purpose, by said Company, its successors and assigns, shall be at all times properly guarded; and any brick or other pavement, or side-walk, at any time or for any purpose whatever, taken up or displaced by said Company shall be properly and speedily replaced and put in proper order by it under the supervision of the city engineer. If said Company, its successors and assigns, shall fail or neglect to repair any street, alley or sidewalk damaged by it, after five days' notice so to do, and as required by the city engineer, then the city shall make such repairs at the expense of said Company, its successors and assigns.

Third. Said company, its successors and assigns, shall pay all damages for injuries to the person or property of any person, firm or corporation, as well as to the city of Muscatine, resulting from occasioned by, or growing out of negligence or improper construction in the laying, construction, erection or operation of any such pipe, main, pole, wire or appurtenance, or the maintenance and use of the same, and shall fully indemnify and save harmless the city of Muscatine, from and against all claims, actions or suits at law or in equity, of any kind or nature, resulting from, occasioned by or growing out of the construction, erection or maintenance of the said pipe, mains, poles, wires or appurtenances, or the negligence or omission of said company, its successors and assigns, servants or employes, to properly guard any excavation or obstruction at any time or for whatsoever purpose placed, made or caused, in any street, alley or public place.

Fourth. Said Company, its successors and assigns, shall lay the mains, pipes, poles, fixtures and other apparatus of said Company, in and along the streets, avenues and alleys of said city as they now are, or may be at the time the same are laid and constructed, and as herein provided; and whenever any of said streets, avenues and alleys, along and upon which said mains, pipes, poles or other fixtures are laid or constructed, shall have been brought to grade by the

city, said company, its successors and assigns shall remove and replace the same at its expense and shall do so within a reasonable time, to be fixed by the city council. And the council shall have the right, whenever it orders any of the streets to be paved, to compel said company, its successors and assigns, to take up worn-out or decayed and leaky gas mains, pipes feeders and poles, and to replace the same with new and substantial mains, pipes, feeders and poles. All poles used, erected or constructed by said company, its successors and assigns, within said city, shall be kept neatly painted as may be directed by the city council, and shall be branded with the initials of the owner thereof.

Fifth. Said Company, its successors and assigns, hereby agrees to furnish said city, for the term of five years, from and after the adoption of this ordinance, and the said city hereby agrees and undertakes to take and pay for the same, as hereinafter set out,—fifty alternating current arc street lights, of 2,000 nominal candle power, each consuming 480 watts or more of current at the lamp terminals, to be furnished by said company, its successors and assigns, and of such kind or design as the city council may require to be kept burning from one-half hour after sunset until
23 one-half hour before sunrise, each and every night. The said arc lights shall all be placed and included in as compact a district as is reasonably possible, under the direction of the city council; the said district to comprise and include the prominent business and residence streets of the city of Muscatine, not remote from the present power plant of said company.

The city of Muscatine agrees to pay for each of said lights the sum of ninety ($90) dollars per year, subject to a pro rata deduction for lights out of defective lights or deficiency in current below the wattage herein fixed—to be paid in equal monthly installments. On the first day of each month the company shall present to the city council a bill, in writing, for light furnished during the preceding month, which bill shall be referred to the city finance committee for corrections or deductions as herein provided, and shall be paid on or before the 25th day of said month.

Sixth. Said Company, its successors and assigns, shall place, maintain and keep in good repair at all times, and at its own expense, and in such place as the city council shall designate, the best automatic, self-registering device or meter of such kind or make as the city council may require; such instrument shall at all times show the number of lamps burning; and the exact number of watts of power on the lines, and register the same; and the wires or leads for the arc light circuit shall pass through or be properly connected with the same.

Seventh. Said Company, its successors and assigns, shall accept, hold and use this franchise subject to the right of the city to make all rules and regulations it may deem proper as to the erection and location of poles, mains, wires and other appliances, and the insulation and installation of electric light and power wires and service

pipes. The city also reserves the right to make such public improvements as it may deem necessary over, along under and across streets, alleys and other public places upon which the mains, pipes, poles and wires of said company, its successors and assigns, are or may be constructed and erected.

Eighth. That any consumer of gas within said city, either for fuel or lighting purposes, shall not be charged to exceed one and 25-100 ($1.25) dollars, per thousand cubic feet of gas, including all meter charges; provided that said company, its successors and assigns, may charge not to exceed one and 50-100 ($1.50) dollars, per thousand cubic feet of gas, to any consumer not paying his bill for gas at the office of said company, its successors or assigns, in the city of Muscatine, by the tenth day of the month succeeding that in which said gas is furnished; also provided that the minimum charge for gas furnished to any consumer in any one month, shall be fifty cents, which last mentioned amount, the said company, its successors and assigns, are authorized to charge and collect in each case where any consumer does not use, in any one month, more than fifty cents worth of gas computed on the scale of prices hereinbefore mentioned; and said charge of fifty cents shall include all meter charge..

Ninth. That any consumer of electricity within said city, either for illuminating or power purposes, shall not be charged to exceed the following rates; including all meter charges:

24 To any consumer using 35,000 watts or less per month, 15 cents per 1,000 watts.

To any consumer using more than 35,000 watts and less than 150,000 watts per month 12½ cents per 1,000 watts.

To any consumer using more than 150,000 watts and less than 300,000 watts per month 10 cents per 1,000 watts.

To any consumer using more than 300,000 watts and less than 800,000 watts per month 8 cents per 1,000 watts.

Provided that said company, its successors and assigns, may charge not to exceed 20 per cent additional to the rates hereinbefore mentioned, to any consumer not paying his bill for electric light or power, at the office of said company, its successors and assigns, in the city of Muscatine, by the tenth day of the month succeeding that in which said electric light or power is furnished; also provided that the minimum charge for electric light or power furnished to any consumer, in any one month, shall be seventy-five cents, which last mentioned amount the said company, its successors and assigns, are authorized to charge and collect in each case where any consumer does not use in any one month, more than seventy-five cents worth of electric light or power, computed at the scale of prices hereinbefore mentioned; and said charge of seventy-five cents shall include all meter charges.

Section 3. That in consideration of the expenditures to be incurred by said company, its successors and assigns, the city council

shall pass all ordinances, penal or otherwise, that in the opinion of said council may be necessary to carry out the provisions of this ordinance and to protect the rights of the said company, its successors and assigns.

Section 4. That said company, its successors and assigns, shall furnish to said city, free of all charge, gas and electric light to the value of five hundred ($500.00) dollars, per annum, according to the rates hereinbefore mentioned. For gas or electric light used by said city in excess of said amount of five hundred ($500.00) dollars, in any one years, the city shall pay said company, its successors and assigns, not to exceed the rates hereinbefore mentioned.

Section 5. That this franchise and all the rights and privileges conferred hereby on said company, its successors and assigns, are granted upon the further express condition that said company, its successors and assigns, shall in all things and at all times strictly carry out and comply with all the terms, conditions, stipulations and restrictions of a certain other ordinance, entitled—"An ordinance granting to the Citizens' Railway & Light Company, its successors and assigns, the right to construct, operate and maintain an electric railway in and upon the streets, avenues and public places of the city of Muscatine, Iowa, and also granting to the Citizens' Railway & Light Company, its successors and assigns, the right to permit the Davenport and Suburban Railway Company to operate its cars over certain tracks belonging to the first named company, and also granting to the Davenport and Suburban Railway Company the right to operate its cars over certain tracks belonging to the Citizens' Railway & Light Company," otherwise this ordinance to be null, void and of no effect.

25 Section 6. That an ordinance, entitled "An ordinance granting unto Christian Winter and Seevers & Seevers, of Oskaloosa, Iowa, their successors and assigns, the right to construct, operate and maintain in and upon the streets of the city of Muscatine, gas, electric light and power works, also the right to erect poles, wires and other apparatus required and necessary for the operation and maintenance of gas, arc, and incandescent light, heat and power; also all other privileges needed and necessary for the construction, operation and maintenance of the same." adopted by said city on the 6th day of October, 1892, and contained in the Revised Ordinances of said city of the year 1899, at page 316 thereof, and an ordinance entitled—"An ordinance granting unto Christian Winter and Seevers & Seevers of Oskaloosa, Iowa, their successors and assigns, the right to construct, operate and maintain an electric railway in and upon the streets, avenues, and alleys of the city of Muscatine, Iowa, and to erect power houses, poles, and wires for the operation of the same," adopted by said city on the sixth day of October, 1892, and contained in the Revised Ordinances of the said city of the year 1899, at page 321 thereof, and all the rights, privileges and immunities therein granted or conferred, be and the same are hereby repealed.

Section 7. That said company, for itself, its successors and assigns, shall, within ten days from the final adoption of this ordinance, file a written and unconditional acceptance of the same with the city recorder of said city and its failure so to do, shall work a forfeiture of all the rights, privileges and franchises herein granted, and any failure of said company, its successors and assigns, to keep and perform all or any one of the conditions, stipulations and restrictions of this ordinance, shall work a forfeiture of the same.

Passed March 17, 1904.

Approved March 17, 1904.

R. S. McNUTT,
Mayor.

Attest:

H. C. SHOEMAKER,
City Recorder.

26 And thereafter to-wit: On the 28th day of June A. D. 1919 there was filed in said cause an Amended and Substituted Answer which is in words and figures as follows to-wit:

October Term, 1918.

MUSCATINE LIGHTING COMPANY, Plaintiff,

vs.

CITY OF MUSCATINE, IOWA; R. S. McNUTT, Mayor of said City of Muscatine, Iowa; John A. Vetter, William F. Hathaway, William H. Graff, William Cochran, Joe B. Miller, H. F. Meyers, John S. Nietzel and Sidney Terry, Members of the City Council of said City of Muscatine, Iowa, and Ralph U. Thompson, City Attorney of the City of Muscatine, Iowa, Defendants.

Amended and Substituted Answer.

Filed June 28, 1919, Wm. C. McArthur, Clerk, by Lura Parker, Deputy.

Comes now the City of Muscatine, Iowa, R. S. McNutt, Mayor of said City of Muscatine, Iowa, and Ralph U. Thompson, City Attorney of the City of Muscatine, Iowa, being the only defendants served with notice of this suit, and in compliance with the request of the court files this their amended and substituted answer in two counts, and for answer to the bill of complaint herein filed by the plaintiff, respectfully represents and states:

Count One.

Paragraph One.

27 The defendants admit that the City of Muscatine, Iowa, is a municipal corporation and acting under a special charter, and that its administrative, legislative and executive powers are

vested in its city council, consisting of a mayor and eight aldermen. Defendants further admit that the officers of said defendant city, as named in plaintiff's complaint, are the duly qualified and acting officials of said City of Muscatine, Iowa, and that said officials are charged with the duty of adopting the ordinances of said City of Muscatine, Iowa.

Paragraph Two.

Defendants admit the passage of the ordinance referred to in plaintiff's petition as Exhibit "A", but allege that said ordinance was as an amendment to the Franchise Ordinance, referred to in Plaintiff's petition as Exhibit "B" and at the express instance and request of plaintiff, and that both parties have acted under it since the date of its passage.

Paragraph Three.

Admit that on the 17th day of March, 1904, that the City Council of the defendant city adopted the franchise ordinance attached to plaintiff's petition as Exhibit "B" to own, construct, operate and maintain a gas plant and distributing system in the defendant city, under terms and conditions specified therein, and that said franchise ordinance and the written acceptance thereof became a lawful contract in writing by and between the said city of Muscatine, Iowa, and the said Citizens Railway & Light Company, its successors and assigns, and that the same now constitutes such a lawful contract by and between the City of Muscatine and your plaintiff, except insofar as it is modified by the agreement made on April 29, 1914, as is alleged in Count Two of plaintiff's complaint, but defendants deny that under and by virtue of the terms of this contract and the laws of the State of Iowa and the United States at the time of the execution of said contract and at the present time, the plaintiff is entitled to charge such rates for gas sold by it, except those provided for in said
28 lawful contract, as amended on the 29th day of March, 1914, and as is provided for in plaintiff's Exhibit "A."

Paragraph Four.

Defendants admit that the plaintiff has maintained a gas plant in the City of Muscatine, Iowa, but deny that the fair value of the used and useful property necessarily employed in complying with the terms and conditions of said franchise contract is Three Hundred Fifty Thousand ($350,000.00) Dollars.

Paragraph Five.

Defendants admit that on the 29th day of April, 1914, at the instance and request of this plaintiff, the defendant city, acting through its legally constituted authorities, passed a certain ordinance, being attached to plaintiff's petition as Exhibit "A", a copy of which is hereto attached, marked Exhibit "5", and by this reference made a

part hereof, and admit that the plaintiff has in every respect complied with the terms and conditions set forth in said Exhibit "5" since the date of its adoption and passage.

Paragraph Six.

The defendants aver that under the terms and conditions of said contract, (Plaintiff's Exhibit B) and the amendment thereto, (Plaintiff's Exhibit "A") that the plaintiff is not guaranteed any sum or sums as gross earnings, except such as may be earned under the rates fixed in the amended franchise contract, and as is fixed in Plaintiff's Exhibit "A".

Paragraph Seven.

In answer to paragraph seven of plaintiff's petition the defendants aver that under the terms of said contract franchise, and the amendment thereto as adopted by the parties hereto on the 29th day of April, 1914, no provision is made therein which would insure the said plaintiff against loss, or is any provision made in said contract
29 and amendment thereto which insures the plaintiff any net income, except such as is made under and by virtue of the rates fixed as a condition for said grant.

Paragraph Eight.

In answer to Paragraph Eight of plaintiff's Bill of Complaint the defendants aver that at the time the agents of plaintiff drafted said franchise contract, they neglected and failed to make provision therein, and as a condition thereof, an increased rate for the gas sold by it, in the event of an increase in its necessary materials, or any other unfor-seen or unexpected contingency which might arise in the future.

Paragraph Eight and One-half.

In answer to Paragraph 8½ of plaintiff's complaint, the defendants deny that the plaintiff's refused to furnish gas at the rate provided for in said contract; deny that plaintiff established any rate except that provided for in said contract, and aver that the plaintiff at all times since the making of said contract, recognized the rates therein fixed as the contract rate, and never charged a rate in excess thereof until permitted so to do under the order of this court.

Paragraph Nine.

In answer to Paragraph Nine of Plaintiff's Bill of Complaint the defendants admit that the legal rate of interest in Iowa is 6 per cent, but aver that no provision, or conditions are provided for in said franchise contract relative to the rate of interest to be paid by plaintiff in the event of it being compelled to borrow money.

Paragraph Ten.

The defendants in answer to Paragraph Ten of plaintiff's Bill of Complaint aver that there was no conditions annexed to the franchise contract, or provision made therein whereby the said plaintiff or its stock holders would be insured against financial
30 loss upon its acceptance of said contract and the operation of the gas plant as therein mentioned, except only insofar as the rates therein provided.

Paragraph Eleven.

In answer to Paragraph Eleven of plaintiff's complaint the defendants deny that the Ordinance of April 29th, 1914, should be held void by this Honorable Court, or any other Federal Court, as against the complaint for the reason that said Ordinance is an amendment to the franchise contract of date March 17th, 1904, and became a part of the franchise contract of date March 17th, 1904, by the acceptance and consent of plaintiff, and is a legal contract in writing between the Complainant and the defendant city as alleged in Paragraph Three of plaintiff's Bill of Complaint.

Defendants deny all the allegations contained in Sub-Divisions (1), (2), (3) and (4) of Paragraph Eleven of plaintiff's Bill of Complaint.

Paragraph Twelve.

Defendants, in answer to Paragraph Twelve of plaintiff's petition, admit that said plaintiff has several thousand consumers in the City of Muscatine, Iowa, but deny each and every other allegation therein contained.

Paragraph Thirteen.

Defendants deny all the allegations contained in Paragraph Thirteen of plaintiff's Bill of Complaint.

Paragraph Fourteen.

By way of affirmative defense the defendants herein respectfully represents and shows the court that prior to the 17th day of December 1903, and prior to the date of entering into the contract referred to in Paragraph Three of plaintiff's Bill of Complaint, being re-
31 ferred to therein as "Exhibit B", the said Citizens Railway and Light Company maintained and operated a gas and electric light plant in the City of Muscatine, Iowa, and prior to entering into the contract aforesaid, the said Citizens Railway & Light Company had a contract with this defendant city for the lighting of all of the streets, alleys, public places and buildings in said city, and was the only company so operating in said city, but, on the said 17th day of December 1903, this defendant advertised for bids for the lighting of its streets, and awarded a contract for the lighting of certain outlying

streets, which were lighted by gas and gasoline lamps, to the Cleveland Vapor Light Company, a competitor of this plaintiff, and, thereafter, to-wit: on the 17th day of March, 1904, the city council of the defendant city entered into contract with the Citizens Railway & Light Company, plaintiff's assignor, for the lighting of certain other streets in the city, which were lighted with electric arc lamps, and which said contract was embodied and contained in the franchise contract of date March 17th, 1904, and set out therein as Section 5, the contents thereof being fully set out in plaintiff's Exhibit "B".

That the street lighting contracts with these companies expired at the same time, on or about the month of March, 1914.

On the 31st day of March 1914 both companies presented to the City Council their respective contracts for the lighting of the streets, for renewal, fixing therein, their own terms and conditions, and the city council took the same under consideration.

During these negotiations the city council obtained information causing them to believe that the Muscatine Lighting Company was discriminating between its consumers in said city, and that the rates being charged under their franchise contract, plaintiff's Exhibit B, for gas consumed, was unreasonable, excessive and exhorbitant,
32 and on the 18th day of December, 1913, adopted an ordinance, under and by virtue of its additional power, granted unto it by Section 725 of the Code of Iowa, to regulate the rates to be charged for gas consumed by its citizens, fixing the rate therein at $1.00 per thousand cubic feet, a copy of which ordinance is hereto attached, marked Exhibit "1", and by this reference made a part hereof.

On the 24th day of January, 1914, the plaintiff herein instituted an action against the city, in the District Court of Iowa, in and for Muscatine County, asking that the city be restrained from the enforcement of said rates. During all of this time the two companies were making every effort to secure their respective contract for the lighting of the streets. The Muscatine Lighting Company desired the contract for lighting the streets of the entire city, to the exclusion of the Cleveland Vapor Light Company. The members of the City Council were making an effort to secure the best terms obtainable, and were exacting certain conditions from the Muscatine Lighting Company as a consideration for the contract.

On the afternoon of April 23rd, 1914, at the instance and request of the officers and agents of the plaintiff, an informal meeting of the aldermen was called at the place of business of the Mayor, for the purpose of meeting with the agents of plaintiff in an effort to effect a settlement of the litigation aforesaid, and to come to some understanding as to the terms and conditions which would be acceptable to the city for the contract for lighting the streets of the city. The agents of the plaintiff appeared at this meeting, bringing with them a written contract for the lighting of the streets, an ordinance relative to the rates to be charged for electricity, and an ordinance fixing the rate to be charged for gas. At this meeting an
33 understanding was reached and a settlement agreed upon, and a meeting of the council was called for that night, (April 23rd.) upon the request of the plaintiff, for the purpose of

carrying out the agreement made. In compliance with this common understanding a special meeting was held on the night of April 23rd, and the city council proceeded to carry out their part of the contract, by authorizing the Mayor and Recorder to sign the contract, giving plaintiff the right to light all the streets, and by adopting the two ordinances on two readings. The plaintiff was requested to reduce its proposition to writing, which was done and presented to the city council at a special meeting called on the night of April 29th, 1914, for the purpose of consummating the deal as agreed upon. Agents of plaintiff were present at both of these meetings.

The written proposal of plaintiff, a copy of which is hereto attached, marked Exhibit 2 and by this reference made a part hereof, sets forth clearly the agreement as made by the parties. On the night of April 29th, the city council approved the action of the Mayor and Recorder in signing the street lighting contract, and adopted on their third and final reading the ordinance fixing the rate to be charged for gas, as mentioned in said proposal, a copy of which is hereto attached, marked Exhibit 5 and by this reference made a part hereof; it also adopted on its third and final reading the ordinance fixing the rate to be charged for electricity referred to in said proposal, a copy of which is hereto attached, marked Exhibit 3 and by this reference made a part hereof, approved the action of the mayor and recorder in signing the contract for the lighting of the streets, which is referred to in said written proposal, a copy of which is hereto attached, marked Exhibit 4, and by this reference made a part hereof. That the agreement as reached on the afternoon of April 23rd, 1914, was fully and completely
34 carried out by the city council in strict compliance with the terms thereof as set forth in the said written proposal, (defendants Exhibit 2), the cause of action above referred to was dismissed by the Muscatine Lighting Company, and the contract fully consummated between the parties, and has been fully complied with in all its terms and conditions by both parties ever since, until the commencement of this action on the part of complainant.

That Defendant's Exhibits 2, 3, 4 and 5 were all written and prepared by the plaintiff herein, and were represented by *it* as being elements entering into one transaction, and relying upon these representations the defendant carried out all the conditions as set forth in said written proposal.

That all of said instruments constitute one legal, binding contract and both parties are bound thereby.

Count Two.

For further answer to Plaintiff's Bill of Complaint, the defendants state.

Paragraph One.

Defendants admit Paragraph One of Plaintiff's petition. Admit that the persons named in said complainants' bill of complaint are

the duly elected, qualified and acting officers and officials of the said City of Muscatine, Iowa.

Defendants aver that the City of Muscatine, Iowa, is a municipal corporation organized, existing and acting by virtue of a Special Charter granted unto said city by the Legislature of the State of Iowa.

Paragraph Two.

Defendants admit Paragraph One (1) of plaintiff's Bill of Complaint.

35

Paragraph Three.

Defendants admit that part of Paragraph Two (2) of plaintiff's Bill of Complaint commencing with the word "This" in the first line thereof and ending with the word "repealed" in the ninth (9) line thereof, but deny that the amount involved in this controversy, exclusive of interest and costs exceeds the sum of Three Thousand Dollars ($3,000.00), and deny that the determination of this controversy involves the construction of the provisions of the Constitution of the United States, or either of them, to-wit:

(1) Those prohibiting the passage of a law by a State impairing the obligation of a contract, to-wit: Section 10, Article One of the Constitution;

(2) Those prohibiting the taking of private property without due process of law; to-wit: The *Fifty* Amendment to the Constitution;

(3) Those guaranteeing to all citizens of the United States equal protection of the law, to-wit: Section One of the Fourteenth Amendment to the Constitution of the United States;

(4) Those which provide that no State shall deprive any person of life, liberty or property without due process of law, to-wit: Section One of said Fourteenth Amendment to the Constitution of the United States.

Paragraph Four.

The defendants admit that the city of Muscatine, Iowa, did on the 17th day of March, 1904, enter into contract with the plaintiff's assignor, whereby the said company was granted the right under certain terms and conditions which were annexed to said Franchise Contract as a consideration, to use the streets of the city for the placing therein poles, wires, and pipes, and for the further

36 purpose of operating and maintaining in said city a gas and electric light plant for the manufacture and sale of gas and electricity to the city and its inhabitants for a period of twenty-five years, as alleged in plaintiff's bill of complaint commencing with the word "On" in the first line of Paragraph Three (3), and end-

ing with the word "Company" in the Fifteenth (15) line, on page 4, Paragraph Three (3) of said Bill of Complaint.

Defendants deny that under and by virtue of the terms of said contract and the laws of the State of Iowa and the United States at the time of the execution of said cantract or at the present time, the plaintiff is entitled to charge such rates for gas sold by it to its consumers in said city, as will enable it to pay therefrom aperating expenses and taxes, or any other sum or sums, except that rate as is provided for in the contract of said plaintiff with the city of Muscatine, Iowa, as amended by the parties on the 29th day of April, 1914, and as is hereinafter more specifically recited.

The defendants deny all of Paragraph Four (4) of Plaintiff's Bill of Complaint; deny that the present fair value of the used and useful property necessarily employed by Plaintiff in complying with the terms of its said contract is in excess of Three Hundred Fifty Thousand ($350,000.00) Dollars.

Paragraph Five.

The defendants deny all of paragraph Five (5) of plaintiff's bill of complaint, and aver the facts to be; That on and prior to the year 1913 the city of Muscatine, Iowa, was under contract with the plaintiff herein for the lighting certain streets of the city with electric arc lamps; that during this same period of time the said city also had and was under contract with another utility company
37 for the lighting of certain outlying streets with gas and gasoline lamps, this lat-er company being known as the Cleveland Vapor Light Company. That the Muscatine Lighting Company and the Cleveland Light Company were competitors in the field of street lighting in the City of Muscatine, Iowa.

That the contracts with these two companies in respect to the street lighting expired at the same time, to-wit:—on or about the month of March, 1914.

That on the 31st day of March, 1914, the Muscatine Lighting Company, this plaintiff, and the Cleveland Vapor Light Company presented their respective contracts to the City Council of the defendant city for renewal, both of said companies having prepared their respective contracts, fixing therein their own terms and conditions as considerations for the grant, and same were thereupon submitted to the city council of this defendant for their consideration.

The controversy between these two companies in competing for this valuable grant had extended for over a year and had become quite spirited, and during this time it came to the knowledge of the city council that the Muscatine Lighting Company who had been supplying the gas to the Cleveland Company, that said Cleveland Company, and certain citizens of Muscatine, Iowa, were receiving gas from the said plaintiff herein at a rate not to exceed 90 cents per one thousand cubic feet consumed.

Being credibly informed and believing that the said plaintiff was discriminating between its consumers in said city and that the rate then being charged the consumers of said city under its contract of date March 17th, 1904, to-wit: $1.35 per One Thousand cubic

feet was unreasonable, exhorbitant and excessive for the consumer, that City Council of said City, attempted and did on the 18th day of December, 1913, adopt an ordinance, under and by virtue
38 of its additional powers granted unto it by Section 725 of the Code of Iowa, to regulate rates, fixing in said ordinance a rate to be charged by the Muscatine Lighting Company at $1.00 per Thousand Cubic Feet of gas consumed, which said Ordinance is attached hereto, marked "Exhibit 1" and by this reference made a part of this answer.

That on or about the 24th day of January, 1914, the Muscatine Lighting Company instituted in the District Court of Iowa, and equitable action against the City of Muscatine asking that the city be restrained from the enforcement of said rates as fixed in said Exhibit 1.

That during all of this time the said Muscatine Lighting Company and the said Clevêland Vapor Light Company were making efforts to procure from the city the contract for the lighting of the streets of said city of Muscatine. The Muscatine Lighting Company desired the contract for the lighting of all of the streets of said city to the exclusion of the said Cleveland Vapor Light Company, and, the Cleveland Vapor Light Company desired simply the renewal of its contract at a much reduced price per lamp. The City Council during all of this time were bending every effort to procure the best contract obtainable, and were exacting certain conditions from the Muscatine Lighting Company for the contract and as consideration for the same.

On the 23rd day of April, 1914, the officers and agents of the Muscatine Lighting Company appeared in the City of Muscatine and requested the Mayor of said City to call the aldermen of said city together for the purpose of a conference in an effort to settle the litigation aforesaid, and to talk over the terms and conditions which would be acceptable to the city for the granting of the contract to their company for the lighting of the city streets to the exclusion of the said Cleveland Vapor Light Company. This request was
39 granted and the city officials and the authorized officers and agents of said Muscatine Lighting Company met at the place of business of the Mayor of the City on the evening of April 23rd, 1914.

That the officials of said Lighting Company had with them at the time of said meeting certain instruments which had been previously prepared by them, to-wit: A contract for the lighting of the public streets and places of the city of Muscatine, a copy of which is hereto attached, marked "Exhibit 4" and which is by this reference made a part hereof; A certain Ordinance fixing the rate to be charged for electric energy, a copy of which is herto attached *hereto*, marked "Exhibit 3" and by this reference made a part hereof, and a certain ordinance fixing a maximum rate to be charged for gas, a copy of which is hereto attached, marked "Exhibit 5" and by this reference made a part hereof.

The foregoing instruments were all written and prepared by the officials of the Muscatine Lighting Company without the knowledge or solicitation of the City of Muscatine or its officers, and were voluntarily presented to the said city officials on the evening aforesaid,

At this meeting it was finally agreed by and between the city officials and the authorized agents of the Muscatine Lighting Company, upon the oral statements of the company officials that the Lighting Company would give the gas rate, as fixed in said ordinance (Exhibit 5), with other conditions there agreed upon as a consideration to the city for the contract to light the entire city street system. It was also agreed that the city council should meet that night, April 23rd, 1914, in Special Session, and should enter into contract for the lighting of the streets, and should pass the ordinance on two readings, which special meeting was called and the
40 contract signed and the ordinances adopted as agreed upon. It was also agreed that the officials of the plaintiff Company should present at the next meeting of the council their proposition, as agreed upon, in writing.

The City Council of the defendant City met again in special session on the night of April 29th, 1914, for the special purpose of carrying out its agreement which had been orally entered into at the office of the Mayor on the evening of April 23rd, 1914, and to approve the act of the Mayor and City Recorder in signing the street Lighting Contract, and to pass the ordinances, Exhibits 3 and 5 on their third and final readings.

At this special session the officials of the Plaintiff appeared and presen ed to the city council a written proposal as had been agreed upon, which written proposal, by copy, is attached hereto, marked "Exhibit 2" and by this reference made a part of this answer. That the written proposal contained the various matters which had been agreed upon at the meeting on the evening of April 23rd, 1914, and is a memorandum of the oral contract then and there duly entered into. The agents of said company represented to the city officials that this new rate as fixed in Exhibit 5 was given as a considera ion for the contract to light *to* streets, and that five years would soon pass and the citizens would then enjoy the benefits of $1.00 gas and at the same time avoid the aggravation, cost and expense of litigation resulting from the suit which was then pending in the District Court, hereinabove mentioned.

That on the night of April 29th, 1914, the City Council of this defendant city approved the act of the Mayor and City Recorder in signing the Lighting Contract, and adopted the ordinances on their third and final reading, and in fact carried out their part of the oral agreement strictly in accordance with the terms as set forth in the written proposal, Exhibit 2 hereof.
41 Defendants aver that the agreement when fully consummated constituted a legal, valid, binding and sacred contract between the City of Muscatine, Iowa, the plaintiff herein, and should not be treated as a scrap of paper by either of the parties hereto.

That Exhibits 2, 3, 4, and 5 hereof, are simply elements which enter into the contract which was finally and fully consummated, and became an executory contract on the night of April 29th, 1914.

That thereafter the said parties to said contract proceeded to carry out the terms and conditions thereof and have continued to do so, without complaint, until this action was commenced by the plaintiff asking a court of equity to step in and set aside the same.

The plaintiff has received from the city from time to time, during the four years past, all the benefits coming to it as the fruits of said contract, as well as all the benefits accruing to it from said contract. Said plaintiff has at no time tendered back to the city the contract for the lighting of the city streets, but still continue to receive their benefits therefrom.

Paragraph Six.

The defendants deny all the allegations contained in Paragraph Six of Plaintiff's Complaint, and aver that the plaintiff has failed and neglected to give the maximum contracted rate, and their earnings therefrom credit for the receipts from the sale of coke, tar, am-onium sulphate and other derivatives, and aver that said earnings are based solely upon the receipts from the sale of gas, and gas alone, and further answering the defendants aver that the said plaintiff is not entitled to any earning, except that which it might
42 receive upon the schedule of rates as fixed in the contract which was entered into with the defendant city on the 29th day of April, 1914.

Paragraph Seven.

Defendants deny all of Paragraph Seven (7) of plaintiff's bill of complaint, and deny that the said plaintiff is entitled as a matter of law, to earn a sufficient sum of money to enable it to pay its operating expenses, including maintenance and taxes, to provide a reasonable depreciation, and to yield to it a fair return upon the value of the property used and useful in its business; deny that the plaintiff is, as a matter of law, entitled to any compensation or return whatsoever other than that fixed in the Franchise Contract made and entered into between the parties hereto on the 29th day of April, 1914, and as is more fully set forth in defendants' Exhibits 2, 3, 4, and 5 which are hereto attached.

Paragraph Eight.

Defendants deny all of Paragraph Eight (8) of plaintiff's bill of complaint, and aver that all of said allegations are immaterial, irrelevant; that the said plaintiff's officers and agents as prudent business men should have, and are presumed to have anticipated the future at the time of entering into the binding contract with the City of Muscatine, Iowa, on the said 29th day of April, 1914, and if it now appears that the said officials used poor judgment in respect to reading the future at the time of entering into said legal, binding contract on the said 29th day of April, 1914, that they are now bound by said contract and the rate therein fixed and are not entitled to any relief at the hand of the Honorable Court.

Paragraph Eight and One-half.

43 Defendants deny all of the allegations contained in Paragraph Eight and One Half (8½) of plaintiff's petition; deny that it would be impracticable, unjust and illegal to require the plaintiff, under the conditions now existing to operate its plant and to furnish gas service to the people of Muscatine at a rate less than $1.65 per thousand feet as sold and delivered; deny that the said plaintiff is entitled to any earning other than that based upon the contracted maximum rate as fixed in the schedule in the contract which was entered into between the plaintiff and the city of Muscatine, on April 29th, 1914. Defendants aver that the city of Muscatine, Iowa, has at all times lived up to all the terms and conditions as is provided in said contract; that it has at all times promptly paid unto the plaintiff any and all sums of money due it under said contract, and has faithfully and promptly carried out and fulfilled each and every condition on its part as mentioned in the written proposal, plaintiff's Exhibit 2.

That the said plaintiff has during the four years past received said considerations from the city and are at this time receiving the same from the city of Muscatine, Iowa. That the plaintiff having during the last four years received the greater benefit from its contract, in good faith made with this defendant, desires now to rob the city of the real consideration which had been promised to the city for the benefit of its citizens, to-wit, One ($1.00) Dollar Gas, which the city officials were assured would be received by the city for its people at the end of the five year period following the making of said contract on the said 29th day of April, 1914. That it was this promise which had induced the city officials to grant unto the said plaintiff the street lighting contract, and they were induced by the said statements that the city would enjoy the benefits of $1.00 gas in five years, and thereupon gave the said plaintiff the contract as hereinbefore recited.

44 That the plaintiff herein is not acting in good faith with the City of Muscatine, Iowa, or with this Honorable Court, and have not come into this court with clean hands.

Paragraph Nine.

The defendants deny all the allegations contained in Paragraphs Nine (9), Ten (10) and Eleven (11), of plaintiff's petition.

Paragraph Ten.

Defendants admit that the plaintiff has several thousand consumers in the city of Muscatine, but deny all the other allegations in Paragraph Twelve (12) of Plaintiff's petition contained.

Paragraph Eleven.

Defendants deny all the allegations contained in Paragraph Thirteen (13) of plaintiff's petition, as well as all the allegations of Sub-divisions 1, 2, 3, 4 and 5, thereof; deny that said plaintiff is entitled to any relief whatsoever at the hands of this court of equity or any other Federal Court; deny that this court has jurisdiction to interfere or intermeddle in the contractual affairs of the City of Muscatine, Iowa, between it and this plaintiff.

Paragraph Twelve.

Further answering these defendants aver that the plaintiff having entered into the contract with this defendant city on the 29th day of April, 1914, in good faith, upon representations which induced the city officials to grant them the valuable contract to light the streets of the city of Muscatine, Iowa, and that said plaintiff having acted upon said contract; having treated the same as a contract; having accepted all the benefits accruing unto it for four long years, are now forever estopped from denying the rate as fixed in
45 Plaintiff- "Exhibit 5" as one of the conditions extended to said city of Muscatine, Iowa, as part of the consideration for the granting of the Street Lighting Contract, a copy of which is hereto attached as Exhibit 4.

Wherefore, defendants pray that the court refuse to grant unto the plaintiff the relief prayed for in its petition, for the reasons herein stated, and they further pray that said plaintiff may have no other or further relief from this Honorable Court, and that the bill of complaint be dismissed, and judgment be entered against complainant, and that the defendants may go hence with their cost.

CITY OF MUSCATINE, IOWA,
ROBERT S. McNUTT,
Mayor, and
RALPH U. THOMPSON,
City Attorney of Said City of Muscatine, Iowa,
(Sgd.) By RALPH U. THOMPSON,
City Attorney.
HOFFMAN & HOFFMAN,
P. O. 215 *Iowa Ave., Muscatine, Iowa.*
HERBERT G. THOMPSON,
P. O. 110 *East 2nd Street, Muscatine, Iowa.*

STATE OF IOWA,
Muscatine County, ss:

I, Ralph U. Thompson, first being duly sworn upon oath depose and say that I am the City Attorney of the City of Muscatine, Iowa, and one of the defendants named in the above entitled cause; that I have read the above and foregoing amended and substituted

answer and know the contents thereof, and that the statements therein contained are true as I verily believe.

(Sgd.) RALPH U. THOMPSON.

Subscribed in my presence and sworn to before me by Ralph U. Thompson this 27th day of June, A. D. 1919.

[SEAL.] HERBERT G. THOMPSON,
Notary Public in and for Muscatine County, Iowa.

46

(Copy.)

EXHIBIT 1.

Gas Ordinance.

An Ordinance Fixing the Standard of Illuminating Power of Gas, and the Price to be Charged for Same, by Any Person, Firm or Corporation Furnishing Gas to the Consumer Within the City of Muscatine, Iowa.

Be it ordained by the City Council of the City of Muscatine:

Section 1. That any person, firm or corporation supplying gas to the inhabitants of the city of Muscatine shall not charge to exceed the ($1.00) Dollar per thousand feet therefor, including all meter charges, and no person, firm or corporation chall charge, exact or receive in excess of One ($1.00) Dollar per thousand feet for gas supplied by them to any inhabitant of said city.

Sec. 2. Providing that said person, firm or corporation may charge not to exceed ten (10) per cent additional for one thousand cubic feet over the above named price to any consumer not paying his bill for gas at the office of said person, firm or corporation in said city of Muscatine, by the 10th day of the month succeeding that in which said gas is furnished; also providing that the minimum charge for gas furnished to any one consumer in any one month shall be fifty (50) cents, which last mentioned amount said person, firm or corporation is authorized to charge and collect in each case where any consumer does not use in any one month more than fifty (50) cents' worth of gas, and said charge of Fifty (50) cents shall include all meter charges.

Sec. 3. That the standard of illuminating power of gas for the City of Muscatine shall be twenty-two (22) candle power. The unit and standard of light shall be the volume of light which is produced in a horizontal direction by one standard English candle, burning at the rate of one hundred and twenty (120)
47 grains of sperm per hour.

Sec. 4. Any person, firm or corporation violating any of the provisions of this ordinance shall, upon conviction thereof, be punished by a fine of not less than ten dollars ($10), or more than One Hundred ($100) Dollars.

Sec. 5. This ordinance shall be effective from and after the 31st day of December, 1913.

Sec. 6. All ordinances or parts of ordinances in conflict herewith, are hereby repealed.

Passed and approved this 18th day of December, 1913.

C. KOEHLER,
Mayor.

Attest:
H. B. CAPLE,
City Recorder.

48

(Copy.)

EXHIBIT 2.

To the Honorable Mayor and City Council of the City of Muscatine, Iowa.

GENTLEMEN:

Our attention has been called to the certain gas Ordinance entitled:

"An Ordinance fixing the quality of illuminating gas and the price to be charged for same by any corporation, firm partnership or person furnishing the same to consumers within the City of Muscatine, Iowa."

And which was passed on its second reading by the City Council on the 23rd day of April, 1914, also,

That certain electric light ordinance entitled:

"An Ordinance fixing the price to be charged for electrical energy for lighting by the Muscatine Lighting Company, to consumers in the City of Muscatine, Iowa."

passed on its second reading by the Council on the 23rd day of April, 1914;

Also, that the City on April 23rd, 1914, took proper action authorizing acceptance of the certain street lighting proposition submitted by the Muscatine Lighting Company to the City Council for consideration.

In consideration of the passing of these three matters by the City Council, and on condition that said ordinances are finally passed and the contract as proposed is entered into for the lighting of the streets, the Muscatine Lighting Company in addition to the granting and giving to the City of Muscatin, free of all charge, gas and electric light to the value of Five Hundred ($500.00) Dollars per annum as provided in section four (4) of an ordinance granting to the Citizens' Railway and Light Company, its successors and assigns, the right to construct, operate and maintain gas, electric light, and power plants, and to use the streets, alleys and public places for the transmitting of same as passed March 17th, 1904, further agree to dismiss a certain suit now pending between the company and the

City of Muscatine, wherein a temporary injunction has been
49 granted and as a part of said agreement the company shall reimburse the City for all court costs, and attorneys' fees and all costs of publication relating to dollar gas ordinance and the gas case, in connection with such litigation.

The Muscatine Lighting Company further agrees to enter into a suitable arrangement with the City so as to provide pole space on their poles for the attaching of fire-alarm and police-call wires. The understanding being, that such installation shall be so arranged as not to in any manner interfere with the uses by the company of its poles for its own services.

The Muscatine Lighting Company further agrees to furnish to the City free of charge, three series Tungsten lamps in Weed Park during the Park season. To be placed as designated by the City.

The Company further agrees that arrangements will be made at once with the City whereby transfers will be issued to the passengers to and from the local cars in the City of Muscatine and the present interurban cars operating between Davenport and Muscatine. Such transfers to be, issued under appropriate rules and regulations as to limitation of time and place as may be provided by the Company.

The Company further agrees that the monthly minimum bill in the electric lighting ordinance shall be reduced from seventy-five cents ($.75) to fifty cents ($.50).

The above conditions demanded by the City of Muscatine are agreed to with the understanding that the ordinances referred to will be passed upon their third and final reading, in every respect the same as when approved by your honorable body on the 23rd day of April, 1914, with the exception of the reduction in the minimum charge for electric light from seventy-five cents ($.75) to
50 fifty cents ($.50) and as otherwise amended by insertion of "gross" in gas ordinance, section 2, and the proper execution of the City Street Lighting Contract.

Witness our hand and seal this 29th day of April, 1914.

MUSCATINE LIGHTING COMPANY,
By H. C. BLACKWELL.

51

(Copy.)

EXHIBIT 3.

An Ordinance Fixing the Price to be Charged for Electrical Energy for Lighting by the Muscatine Lighting Company to Consumers within the City of Muscatine, Iowa.

Be it ordained by the City Council of the City of Muscatine:

Section I.

That, the Muscatine Lighting Company, in supplying electrical energy for lighting to the inhabitants of the City of Muscatine shall charge each consumer for electrical energy at the rate of thirteen and one-half (13½) cents per kilowatt-hour for any and all electri-

cal energy consumed up to and including the first forty hours use per month of his connected load or its equivalent, and seven (7) cents per kilowatt-hour for all electrical energy used in such month in excess thereof. Provided, that the Company shall on all bills paid at the Company's office before the tenth of the month following that month in which the electrical energy was used, allow a discount of one (1) cent per kilowatt-hour on the above rates.

Section II.

It is further provided that said Muscatine Lighting Company shall furnish to its consumers for measuring the electrical energy to be used, proper meters free of charge, and further provided that said Muscatine Lighting Company shall be authorized to charge to its consumers a minimum monthly charge of Fifty cents (50¢) in those cases and instances where the amount of electrical energy used by such consumer, at the rate above established, amounts to less than Fifty cents (50¢) in any one month or part of a month. And further provided that each meter shall be considered as a customer hereunder.

It is further provided that in those cases where any consumer desires to close his premises for one month or more, that said Muscatine Lighting Company shall, upon written request from such consumer, remove the electric meter from such premises and reinstall the same upon written application by such consumer, without any charge for such removal or re-installation, and that during the period such meter is thus removed there shall be no minimum monthly charge collected by said Company.

52

Section III.

The rates and charges herein provided shall become effective and in force covering the electrical energy furnished by the Muscatine Lighting Company to its consumers from and after the reading of its meters in April, 1914.

Section IV.

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Passed and approved this 29th day of April, 1914.

(Signed) HARRY KERN.
Mayor of the City of Muscatine.

Attest:

H. P. CAPLE,
City Recorder.

53

(Copy.)

EXHIBIT 4.

Contract for Street Lighting.

This contract, in duplicate, made and entered into this 28th day of April, 1914, by and between the Muscatine Lighting Company, Muscatine, Iowa, a corporation, party of the first part, hereinafter called the Company, and the City of Muscatine, Iowa, party of the second part, hereinafter called the City; Witnesseth:

Paragraph I.

That the Company, its successors or assigns, for a period of ten years, hereby agrees to furnish the City fifty (50) four ampere series luminous magnetite arc lamps, to be located as designated by the City, and four hundred and thirty-two (432) series tungsten lamps commonly known as lamps of eighty candle power, to be located as designated by the City. All of the above mentioned street lamps to be operated on what is known as the "All night, Every Night" lighting schedule. The lamps to be lighted every night, one-half hour after sunset, and extinguished every morning, one hour before sunrise, throughout each of the ten years for which this contract provides.

Paragraph II.

That the Company agrees to maintain and keep in good repair at all times, a recording ampere meter of approved type in order to show the amperage on the arc light circuit and to the time of lighting and extinguishing said arc lights. The location of such ampere meter to be designated by the City Engineer. Deductions for lights out on said arc light circuit shall be based upon the records of this ampere meter. Should outrages occur on street lamps, deductions shall be made for all lamp outrages except due to causes beyond the control of the Company at the rate of one and six-tenths (\$.016) per hour for each hour that a four ampere luminous
54 magnetite arc lamp is not furnishing service, and six-tenths of one cent (\$.006) per hour for each hour that a series tungsten lamp is not furnishing service. The City is to use every reasonable effort to see that the Company is notified of any outrages that might occur.

Paragraph III.

The City agrees to pay for the above mentioned service for each four ampere luminous magnetite arc lamp the sum of Sixty-five Dollars (\$65.00) per lamp per year, and for each series tungsten lamp the sum of Twenty-four Dollars (\$24.00) per lamp per year. Payments for above mentioned service to be made to the Company

monthly as soon as practical after each regular monthly meeting of the City Council after presentation of the monthly lighting bill by the Company.

Paragraph IV.

The City shall have the right to increase the number of lamps from time to time, and the price to be paid for service of such additional lamps as may be required shall be at the same rate and charge as above set out. Any lamp placed in service at any time, under authorization of the city shall continue in service until the expiration of this contract.

Paragraph V.

All street lamps as above provided for shall have their location designated and determined by the City, and should the City decide at any time to change the location of any street lamp or lamps, ample notice shall be given the Company and the expense of such change shall be borne by the City.

Paragraph VI.

This contract for street lights shall continue in effect for a period of ten years, beginning with the date that street lighting service here provided for is put into operation and the company
55 agrees to use every effort to complete the installation of all street lamps at the earliest possible date.

Paragraph VII

That when signed and sealed by each of the parties hereto through their properly authorized officers, this becomes a binding contract between them, it being executed in duplicate.

CITY OF MUSCATINE.
By HARRY KERN,
Mayor.

Attest:
H. B. CAPLE,
City Recorder.

56

(Copy.)

EXHIBIT 5.

An ordinance fixing the quality of illuminating gas and the price to be charged for same by any corporation, firm, partnership, or person furnishing the same to consumers within the city of Muscatine, Iowa.

Be it ordained by the City Council of the City of Muscatine.

Section I.

That any corporation, firm, partnership or person, or its successors or assigns, in supplying gas to the inhabitants of the City of Muscatine, Iowa, shall not charge to exceed One dollar and Ten Cents ($1.10) per thousand cubic feet; providing, however, that said corporation, firm, partnership or person, may charge not to exceed One Dollar and twenty cents ($1.20) per thousand cubic feet of gas used by a consumer who does not pay his bill for said gas by the tenth day of the month succeeding that in which said gas is furnished.

It is further provided that the charge of $1.10 per thousand cubic feet net shall be reduced at the rate of two cents (2¢) per thousand cubic feet each year beginning May 1st, 1915, and continuing for a period of five (5) years, or until the rate is $1.00 per thousand cubic feet net.

Section II.

The gas to be furnished by any corporation, firm, partnership or person to the inhabitants of the City of Muscatine, shall have an average gross heating value of Five Hundred and Ninety (590) British Thermal Units per cubic foot, with an allowable variation of ten per cent (10%) over or under this figure. The test to determine the heating value aforesaid to be made at the Company's works as the gas passes from such works into the distribution system. And that said test must be made whenever required by the City Council and the City shall have the right at any time to inspect and test said gas by a competent inspector appointed by the city.

57

Section III.

Be it further provided that said corporation, firm, partnership or person shall furnish to its consumers for measuring the gas to be used, proper meters, free of charge; and further provided that said corporation, firm, partnership or person shall be authorized to charge to its consumers a minimum monthly charge of fifty cents (50¢) in those cases and instances where the consumer does not use in any one month, more than Fifty cents (50¢) worth of gas computed on the scale of prices hereinbefore mentioned; and said charge of fifty cents (50¢) shall include all meter charges.

Section IV.

It is further provided that in those cases where any consumer desires to close his premises for one month, or more, that said corporation, firm, partnership or person shall, upon written request from such consumer, remove the gas meter from such premises and reinstall the same upon written application by such consumer, without any charge for such removal or re-installation, and that during the period such meter is thus removed there shall be no minimum monthly charge collected by said company.

Section V.

Any corporation, firm, partnership or person violating any of the provisions of this ordinance, shall, upon conviction thereof, be punished by a fine of not less than Ten Dollars ($10) or more than One Hundred Dollars ($100).

Section VI.

This ordinance shall be effective for gas furnished from and after May 1st, 1914.

58

Section VII.

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Passed and approved this 29th day of April, 1914.

HARRY KERN,
Mayor of the City of Muscatine.

Attest:

H. B. CAPLE,
City Recorder.

59 MUSCATINE LIGHTING COMPANY, Plaintiff,

vs.

CITY OF MUSCATINE et al., Defendants.

Admissions.

It is admitted that Ex. 2 attached to the pleadings in this case is the proposal made by the complainant to the City of Muscatine, and that the exhibit attached to the pleadings is a correct copy thereof.

It is admitted that Ex. No. 1, attached to the pleadings, is a correct copy of Ordinance adopted Dec. 18, 1913, and that said Ordinance was duly adopted by the City Council of Muscatine.

It is admitted that an action was brought in the District Court of Muscatine County, Iowa, by the complainant, to enjoin the enforcement of the aforesaid Ordinance Ex. 1, and that a temporary injunction issued; such proceedings being upon the charge that the rate fixed in the Ordinance Ex. 1, was confiscatory.

It is admitted that the Ordinance, copy of which is attached to the pleadings as Ex. 3, was adopted at the date therein given, and that Ex. 3 is a correct copy.

60 It is admitted that Ex. No. 4 is a street lighting contract of date given therein, and the copy attached to the pleadings is a correct copy thereof.

Ex. 5, attached to the pleadings is a correct copy of the Ordinance adopted at the date therein given, and being the ordinance referred to in the pleadings herein.

The Company admits that it has conformed to, and complied with all the terms of the Ordinance set forth as Ex. 5 ever since the passage and adoption of the same until the institution of this action.

It is agreed that the complainant has operated under Ordinance No. 3 aforesaid from the date of its adoption up to the present time, and is still operating thereunder.

It is agreed that the complainant has been operating under the contract Ex. 4 from the date thereof until the present time.

Testimony.

DAN SULLIVAN.

Q. Where do you live?
A. Muscatine, Iowa.
Q. How long have you lived there?
A. 15 years.
Q. Did you ever hold an official position with the City of Muscatine?
A. Yes, Sir.
Q. What was that position?
A. Alderman from 1912 to 1916.
Q. I will ask you—did you ever study law?
A. Yes, Sir.
Q. Where?
A. Here at the State University, and at the law school Denver University in Colorado.

61 Q. In 1913, I will ask you if you introduced an Ordinance providing for gas to be sold in the City of Muscatine at $1.00 per thousand cubic feet.

Objected to as incompetent and immaterial.

Taken subject to objection.

A. I did.
Q. I now hand you defendant's exhibit No. 2, and will ask you if you ever saw that instrument before?
A. I did.
Q. Where?
A. It was first read and filed in the Council Chamber in Muscatine.
Q. Who had it when you first saw it?
A. The Recorder had it brought there by Mr. Blackwell.
Q. Did you see Mr. Blackwell present that to the City Recorder of Muscatine?
A. Yes, Sir.
Q. What date was that?
A. I think it was the 29th of April, 1914.

Q. Were you a member of the City Council at that time of Muscatine?

A. Yes sir.

Q. I will ask you if you at the time this proposal was presented—if you said anything to the Council and Mr. Blackwell, Supt. of the Muscatine Lighting Company in respect to submitting the various ordinances mentioned in this proposal to the vote of the people?

Objected to, incompetent and immaterial. Taken subject to objection.

A. I did.

62 Q. What if anything did Mr. Blackwell say to the council then in session, in reply to your suggestion?

Objected to as incompetent, immaterial and irrelevant. Contract is the best evidence. Taken subject to objection. Exception.

A. Mr. Blackwell said that in regard to the lighting contract, that it was a contract and not a franchise, and it did not have to be submitted to a vote of the people, and that the electric ordinance and gas ordinance, was also a contract and agreement, and considered so by them.

Move to strike out answer, so much of it as telling in what light Mr. Blackwell considered these Ordinances, as the Ordinances speak for themselves.

(By the Court:) The statement of the witness as to what he construed the ordinance to be, is stricken out as a conclusion of the witness; not binding upon anybody.

Q. You were at the meeting of the City Council on the night of April 23, 1914, were you?

A. Yes, sir.

Q. I will ask you if Mr. H. C. Blackwell was present at that meeting?

A. Yes, sir.

Q. I will ask you if you ever saw Exs. 3, 4, and 5?

A. I did.

Q. Who had Exhibits 3, 4 and 5 when you first saw them?

Objected to as immaterial and irrelevant. Taken subject to objection. Exception.

63 A. The City Recorder had them.

Q. Do you know who presented them to the City Recorder?

Same objection; same rule. Exception.

A. They were presented to the City Recorder by Mr. Blackwell, head of the Lighting Company at that time, drawn by him.

Move to strike out last part of answer as to who drew them, as not responsive.

(By the Court: It may go out.)

Q. I will ask you, do you know upon what night and upon what date Ex. No. 5 and Ex. No. 3 were passed if at all by the City Council upon two readings?

Objected to as immaterial and irrelevant. Taken subject to objection. Exception.

A. The 23rd of April, 1914.
Q. Was Mr. Blackwell present at that meeting?
A. He was.
Q. Upon what date was it that Ex. No. 4 was presented to the City Council for its adoption?

Same objection, immaterial and irrelevant. Overruled. Exception.

A. The 23rd of April.
Q. And was Mr. Blackwell present at that time?
A. Yes, sir.
Q. I will ask you state if you know, whether or not on the night of the 23rd of April, 1914, whether or not the provisions as contained in Ex. No. 2 were presented to the Council in any different form than Ex. 2 is now in?

Objected to as immaterial and irrelevant, and seeking to change a written document.

(By the Court: That is all admitted. I can't see how it can
64 add anything to it.)

Question not answered.

Q. What was said by Mr. Blackwell if anything to this Council at the time of the passage of the Ordinances and execution of this contract in question—street lighting contract, in respect to the time or period that $1.10 gas Ordinance would run.

Objected to as incompetent, immaterial, and seeking to add something to a written document. Sustained. Exception.

65 STATE OF IOWA,
Johnson County, ss:

I, N. E. Hess, being first duly sworn on oath do say that the foregoing testimony was taken by me in shorthand, and duly transcribed by me, and that the same is a true and correct copy of my shorthand notes taken at that time.

(Sgd.) N. E. HESS.

Subscribed and sworn to before me this 16th day of October, 1919.

(Sgd.) C. F. HAMBRECHT,
[SEAL.] *Notary Public, Johnson County, Iowa.*

Endorsed: Filed October 17, 1919. Wm. C. McArthur, Clerk, By Louis J. Adelman, Deputy.

66 And thereafter to wit: On the 15th day of August, A. D. 1919, there was filed in said cause a Decree which is in words and figures as follows to wit:

MUSCATINE LIGHTING COMPANY, Plaintiff,

vs.

CITY OF MUSCATINE, IOWA, et al., Defendants.

Decree.

And now on this 15th day of August, 1919, in the above entitled case, the parties appearing by counsel, and the pleadings herein being presented and duly considered.

It is ordered and adjudged, that this case be set down for hearing upon Count One of the Answer—the issues presented by said Count of said answer to be first tried and determined before proceeding with any of the other defenses herein.

To this order setting the case for trial upon said separate issue, the plaintiff and defendants except. The plaintiff requests the court to try the entire case—to appoint a Master and proceed to the determination of all of the issues in the case. This request is denied, and the plaintiff excepts.

And now on this 15th day of August, 1919, this case coming on for hearing upon the issue raised by the First Count of the answer under the foregoing order, the Court proceeds to the trial thereof, and by consent of parties, the evidence heretofore introduced in
67 this case is to be considered in the determination of the issues presented by the first count of the answer aforesaid. And the case being now fully tried and submitted, and the court being now fully advised finds:

That the rates complained of by the plaintiff, were in fact fixed by contract of the parties, as alleged in said Count One of said answer, and that said rates are valid and binding upon the plaintiff, regardless of the claim in the plaintiff's petition that the same are confiscatory, and that in view of such contract rates, the facts stated in the Bill of Complaint and amendments thereto, entitle the plaintiff to no relief; such rates being fixed by a contract binding upon the plaintiff and that for this reason the plaintiff is not entitled to any relief herein, and its Bill of Complaint is dismissed. The plaintiff excepts.

The plaintiff makes oral request that the temporary injunction heretofore granted, be continued, or that additional order of injunction be issued, to be effective pending the appeal in this case, and is given leave to file written application in support of such request, and the temporary injunction and bond are continued until further orders herein. The court reserving jurisdiction and power to make such further orders, and reserving full power upon final hearing, to make such orders as may be necessary to carry out any order of distribution of funds if the same becomes necessary under ruling of the Appellate Court.

(Sgd.) MARTIN J. WADE,
Judge.

Filed August 15, 1919. Wm. C. McArthur, Clerk.

68 And thereafter to wit: On the 19th day of Sept., 1919, there was filed in said cause a Petition for Appeal and order allowing same, which are in words and figures as follows, to wit:

MUSCATINE LIGHTING COMPANY, Plaintiff,

vs.

CITY OF MUSCATINE, IOWA; R. S. MCNUTT, Mayor of said City of Muscatine, Iowa; John A. Vetter, William F. Hathaway, William H. Graff, William Cochran, Joe B. Miller, H. F. Meyers, John S. Nietzel and Sidney Terry, Members of the City Council of said City of Muscatine, Iowa, and Ralph U. Thompson, City Attorney of the City of Muscatine, Iowa, Defendants.

Petition for Appeal.

To the Hon. Martin J. Wade, District Judge:

The above named Muscatine Lighting Company, feeling aggrieved by the Decree rendered and entered in the above entitled cause upon the Fifteenth day of August, A. D. 1919, does hereby appeal from said Decree to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said Decree was based, duly authenticated be sent to the Supreme Court of the United States sitting at the Capitol in the City of Washington, D. C., under the rules of such Court in such cases made and provided.

69 And your Petitioner further prays that the proper order relating to the required security to be required of him be made.

MUSCATINE LIGHTING COMPANY.
By JOE R. LANE,
W. M. WARNER,
WM. CHAMBERLAIN,
Its Solicitors.

Appeal allowed upon filing bond to be approved by the court or clerk in sum of $500.00.

Witness my hand this 13th day of September, 1919.

(Sgd.) MARTIN J. WADE,
Judge.

Filed Sept. 19, 1919. Wm. C. McArthur, Clerk, By Louis J. Adelman, Deputy.

70 And thereafter to wit: On the same day, September 19th, 1919, there was filed in said cause an Assignment of Errors which is in words and figures as follows to wit:

MUSCATINE LIGHTING COMPANY, Plaintiff,

vs.

CITY OF MUSCATINE, IOWA; R. S. McNUTT, Mayor of Said City of Muscatine, Iowa; John A. Vetter, William F. Hathaway, William H. Graff, William Cochran, Joe B. Miller, H. F. Meyers, John S. Nietzel and Sidney Terry, Members of the City Council of said City of Muscatine, Iowa, and Ralph U. Thompson, City Attorney of the City of Muscatine, Iowa, Defendants.

Assignment of Errors.

Filed September 19, 1919. Wm. C. McArthur, Clerk, By Louis J. Adelman, Deputy.

Now at the time of filing its Petition for Appeal in the above entitled action, the complainant files the following Assignment of Errors and says that the Decree entered in the above cause on the Fifteenth day of August, 1919, is erroneous and unjust to the complainant and violates the principles of equity in this:

71

I.

Because the District Court of the United States in and for the Southern District of Iowa, Davenport Division, being the trial court, declined and refuses to hear the evidence in the case upon all allegations of the Bill of Complaint, and split the plaintiff's cause of action, trying only the issue raised by the first Count of defendant's Answer, viz:

The question of whether the Ordinance of the City of Muscatine of date April 29th, 1914, was in fact and in law a contract between the said City of Muscatine and the plaintiff Company; thus rendering it impossible for complainant to present its evidence, as to the merits of the entire controversy and have the same incorporated as a part of the record of this case upon its appeal.

II.

Because the trial court in splitting plaintiff's cause of action and hearing only the issue presented by the first Count of defendant's Answer required this plaintiff in order to have the merits of its case passed upon to try another action between it and the defendants when the whole case should have been heard and determined in a single action.

III.

Because the trial court erred in holding that the Rate Ordinance of the City of Muscatine, Iowa, passed under date of April 29th, 1914, and being Exhibit "A" of plaintiff's petition, did under the facts as shown in evidence constitute a contract between the City of

Muscatine and the complainant, under which the complainant obligated itself to supply gas within said city during the unexpired term of its franchise at the price therein fixed for the reason that under the undisputed evidence in the record, the said Ordinance was purely a Legislative Enactment of the City of Muscatine
72 passed pursuant to the rate making power delegated to it under the Statutes of the State of Iowa, and particularly under Section 725 of the Code of Iowa 1897 as amended and was applicable generally within said City to all persons or corporations selling gas therein and carried penalty for its violation and was not accepted and was not in any respect contractual by the complainant Company.

IV.

Because the City of Muscatine at the time of the passage of the Rate Ordinance of date April 29th, 1914, being Exhibit "A" Plaintiff's Bill was forbidden by Statute, to-wit, Section 725 of the Code of Iowa 1897 as amended to bind itself by a contract fixing any definite rate for any particular time.

V.

Because there is no testimony whatever to support the contention of the defendant and the finding of the Court that the said Rate Ordinance passed under date of April 29, 1914, being Exhibit "A" attached to plaintiff's Bill constituted a contract but on the contrary the testimony conclusively shows that the said Ordinance was adopted by the City of Muscatine as an Ordinance fixing complainant's rates of charge by law and not by contract and was so understood by this complainant and by the City at the time of its passage and adoption.

VI.

Because the written proposal of the complainant Company under date of April 29, 1914, which is Exhibit "2" attached to defendant's amended and substituted Answer, clearly sets forth in express terms the proposal made by the Complainant Company, and the acceptance of such proposal by the defendant City and the said complainant Company was not bound beyond the terms thereof.
That under said proposal and the acceptance thereof, there is
73 to be found no agreement whatever upon the part of the complainant that said Rate Ordinance should be considered in any other manner than as a Legislative Act of the City, which it would be the duty of the City to amend or repeal at any time that conditions had so changed as to render the rate named therein confiscatory.

VII.

Because under the Statutes of the State of Iowa, to-wit, Section 725 of the Code of Iowa 1897, the defendant City at the time of the

passage of said Ordinance had not and has not now power or authority to fix the rates of charge of the complainant Company by contract but on the contrary had been delegated and did possess and does now possess full and complete power to fix such rates by Legislative Act and its action in the fixing of the complainant's rates by said Rate Ordinance must be held to have been pursuant to and in the exercise of the legislative power expressly conferred upon it under the Statutes of the State of Iowa.

VIII.

Because the Complainant and the City of Muscatine, Iowa, defendant, were forbidden by the Statutes of the State of Iowa, to-wit: Section 725 Code of Iowa 1897, as amended, from entering into any contract binding upon them fixing specifically rates for any definite time.

MUSCATINE LIGHTING COMPANY.
By JOE R. LANE,
E. M. WARNER,
WM. CHAMBERLAIN,
Its Solicitors.

74 And thereafter to-wit: On the same day September 19th, 1919, there was filed in said cause Bond on Appeal which is in words and figures as follows to-wit:

MUSCATINE LIGHTING COMPANY, Plaintiff,

vs.

CITY OF MUSCATINE et al., Defendants.

Bond on Appeal.

Approved and Filed September 19, 1919. Wm. C. McArthur, Clerk,
By Louis J. Adelman, Deputy.

Know all men by these presents: That we, Muscatine Lighting Company, a corporation as principal, and Tri-City Railway & Light Company, a corporation as surety, are held and firmly bound unto the City of Muscatine, Iowa, the Mayor and Aldermen, and persons named as defendants in the above entitled cause in the sum of Five Hundred Dollars ($500.00) lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment well and truly to be made we bind ourselves and each of us jointly and severally by these presents.

Sealed with our seals and dated this 15th day of September, 1919.

75 Whereas the above named Muscatine Lighting Company has prosecuted a Writ of Error to the Supreme Court of the United States to reverse the Judgment of the District Court for the

Southern District of Iowa, Davenport Division in the above entitled cause.

Now, therefore, the condition of this obligation is such that if the above named Muscatine Lighting Company shall prosecute its said appeal to effect and answer all costs if it failed to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

MUSCATINE LIGHTING COMPANY,
By JOE R. LANE,
Its Attorney.
TRI-CITY RAILWAY & LIGHT COMPANY,
By B. J. DENMAN,
President.

STATE OF IOWA,
County of Scott, ss:

On this Fifteenth day of September, 1919, personally appeared before me B. J. Denman to me known to be the person executing the foregoing instrument as an officer of the Tri-City Railway & Light Company, and acknowledged the execution of the same to be the free act and deed of said Company by him as its officer for the purposes therein set forth, and the said B. J. Denman being duly sworn did further say that the said Company, Tri-City Railway & Light Company is a corporation and has property in this jurisdiction in the State of Iowa of more than Ten Thousand Dollars ($10,000.00) over and above its just debts and legal liabilities and property exempt from execution.

B. J. DENMAN.

76 Subscribed and sworn to before me this 15th day of September, A. D. 1919.

JOE R. LANE,
Notary Public, Scott County, Iowa.

The within Bond is approved both as to sufficiency and form this 19th day of September, 1919.

WM. C. McARTHUR,
Clerk,
By LOUIS J. ADELMAN,
Deputy.

77 And thereafter to-wit: On the 6th day of October A. D. 1919 there was filed in said cause Præcipe for Transcript which is in words and figures as follows to-wit:

MUSCATINE LIGHTING COMPANY, Plaintiff,

vs.

CITY OF MUSCATINE, Defendants.

Præcipe for Transcript of the Record in Appeal to United States Supreme Court.

Filed October 6, 1919. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

To the Clerk of said Court:

The plaintiff, Muscatine Lighting Company, has perfected its appeal to the Supreme Court of the United States from the Decree entered in said cause on the Fifteenth day of August, 1919, and the plaintiff does now request and direct that you prepare a transcript of the record proceedings and documents upon which said Decree was based, duly authenticated and file the same with the Clerk of the Supreme Court of the United States sitting at the Capitol in the City of Washington, D. C.

That there shall be incorporated into the transcript of the said record on such appeal the following portions of the record, viz:

78 (*a*). Bill of Complaint of Muscatine Lighting Company, plaintiff.

(*b*). Amended and Substituted Answer of defendants.

(*c*). Each and all of the certain admissions made of record before the Honorable M. J. Wade at the time of the hearing of said cause.

(*d*). The testimony of the witness, Dan Sullivan, introduced at said hearing.

(*e*). Order of the Court under date of August, 1918, (as shown in Final Decree of Court) ordering said cause to be first tried upon Count One of the Answer.

(*f*). Final Decree of the Court entered under date of August 15th, 1919.

(*g*). Petition of plaintiff for appeal to the Supreme Court of the United States, and allowance thereof by the Court.

(*h*). Bond on appeal filed and approval thereof.

(*i*). Assignment of Errors.

(j). Citation on defendants to appear in said appeal to the Supreme Court of the United States issued under date of September 20, 1919, and service thereof.

LANE & WATERMAN,
E. M. WARNER,
WM. CHAMBERLAIN,
Attorneys for Muscatine Lighting Co.,
Plaintiff and Appellant.

Service of the above Præcipe is hereby accepted, and the receipt of a copy thereof is hereby acknowledged this 3d day of October, A. D. 1919.

RALPH U. THOMPSON,
Attorneys for Defendants and Appellees.
HERBERT G. THOMPSON,
HOFFMAN AND HOFFMAN.

79 UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

I, Wm. C. McArthur, Clerk of the District Court of the United States for the Southern District of Iowa, hereby certify the foregoing — pages to contain a full, true and complete transcript of the record of the case of Muscatine Lighting Company, Complainant, vs. City of Muscatine, Iowa, et al., No. 4020—Equity, Davenport Division, as called for by the præcipe for transcript filed in said cause October 6th 1919; as full, true and complete as the originals thereof on file and of record in office in the City of Davenport in said District. I further certify that I transmit herewith as part of said transcript the original Citation with acceptance of service thereof by attorneys for defendants.

In witness whereof I hereunto set my hand and affix the seal of said Court at office in the City of Davenport in said District this 17th day of October A. D. 1919.

[Seal U. S. District Court for the District of Iowa.]

WM. C. McARTHUR,
Clerk of said Court,
By —— ——.

Endorsed on cover: File No. 27,333. S. Iowa D. C. U. S. Term No. 578. Muscatine Lighting Company, appellant, vs. City of Muscatine, Iowa, et al. Filed October 20th, 1919. File No. 27,333.

DEC 13

INDEX

STATEMENT OF THE CASE:

Nature of the Action and Issues..... 1

STATEMENT OF FACTS 4
Proposal of the Company..... 4
The Ordinance attacked 10
Decree of the Court 14

SPECIFICATIONS OF ERROR:

Number I 15
Number II 16
Number III 16
Number IV 17
Number V 17
Number VI 18
Number VII 18
Number VIII 19

BRIEF OF ARGUMENT:

Regulation of rates by law and establishment by contract 19
Iowa cities and towns are empowered to regulate by law and denied authority to establish by contract 21
The decision of the Supreme Court of Iowa restoring the State Statutes defining the powers and duties of its municipal corporations is considered as final by this Court 25
The Iowa rule is in harmony with the rules of this Court 27
A contract beyond the corporate power of either party is invalid.....30
No contract fixing rates unalterably and for a fixed time was in fact made.....31

ARGUMENT 35
Had the City any power to enter into the alleged contract? 36

The decisions of the Supreme Court of Iowa are final in this matter 48
No warrant for claim that there was an attempt made to fix rates by contract.....52

TABLE OF CASES CITED

B

Balkam vs. Woodstock Iron Company, 154 U.S., 177.
B. & O. Railway vs. Baugh, 149 U.S., 368.
Baltger vs. Raleigh Air Line Railway Company, 115 U.S. 634.

C

California Bank vs. Kennedy, 167 U.S. 362.
Cedar Rapids Gas Company vs. City of Cedar Rapids, 144 Iowa 426.
Central Transportation Company vs. Pullman Car Company, 139 U.S. 48.
Citizens Street Railway vs. Detroit Railway, 171 U. S. 48.
Claiborne County vs. Brooks, 111 U.S. 400.
Cleveland vs. Cleveland City Railway Company, 194 U.S. 519.
Columbus Railway, Power & Light Company vs. City of Columbus, 249 U.S. 399.
Concord First National Bank vs. Hawkins, 174 U.S. 364.
Connecticut Mutual Life Insurance Company vs. Cushman, 108 U.S. 51.
Crowley vs. Christensen, 137 U.S. 86.

D

Danville Water Company vs. Danville City, 180 U.S. 619.
Denver vs. Denver Union Water Company, 246 U.S. 178.
Des Moines Gas Company vs. Des Moines, 238 U.S. 153.
Detroit vs. Detroit Citizens Railway Company, 184 U.S. 368.

Detroit vs. Osborne, 135 U.S. 492.
Dillon on Municipal Corporations, Fourth Edition, Section 89.

E

Elmensdorf vs. Taylor, 10 Wheat., 152.
Ennis Waterworks vs. Ennis, 233 U.S. 652.
Equitable Life Assurance Society vs. Brown, 213 U.S. 25.

F

Fifth Avenue Coach Company vs. New York, 221 U.S. 467.
Freeport Water Company vs. Freeport City, 280 U. S. 587.

G

Grand Rapids Electric Light & Power Company vs. Grand Rapids (C. C. A.), 33 Federal 659.

H

Hartford Insurance Company vs. Chicago, etc. Railway Company, 175 U.S. 91.
Hawkins vs. Young, 174 Iowa, 383.
Heins vs. Lincoln, 103 Iowa, 69.
Hill vs. Memphis, 134 U.S. 198.
Home Telephone Company vs. Los Angeles, 211 U.S. 265.

I

Iowa Railway & Light Company vs. Jones Auto Company, 182 Iowa 982.

J

Jefferson City Gas Light Company vs. Clarke, 95 U.S. 644.

K

Knoxville Gas Company vs. Knoxville (C. C. A.), 261 Fed. 283.
Kelley Mans Company vs. Sibley, 137 Federal, 586.

L

Lilley vs. Chicago, 103 U.S. 155.
Lincoln Gas & Electric Light Company vs. Lincoln, 250 U.S. 256.
Louisville & Nashville Railway Company vs. Kentucky, 161 U.S. 677.

M

McCormick vs. Market Bank, 165 U.S. 538.
McQuillan Municipal Corporations, Vol. 4, Section 1733.
Memphis Street Railway Company vs. Moore, 243 U.S. 299.
Meriweather vs. Garret, 102 U.S. 472.
Minneapolis vs. Minneapolis Street Railway Company, 215 U.S. 417.
Minneapolis & St. Louis Railway Company vs. Columbus Rolling Mill, 119 U.S. 149.
Minturn vs. Larue, 23 How. 435.
Missouri vs. Chicago, Burlington & Quincy R., 241 U.S. 533.
Mobile vs. Watson, 116 U.S. 289.
Morgan County vs. Allen, 103 U.S. 498.

N

Noblesville vs. Noblesville Gas & Light Company, 157 Ind. 162.
Norton vs. Shelby County, 118 U.S. 425.

O

O'Brien vs. Wheelock, 184 U.S. 430.
Old Colony Trust Company vs. Omaha, 230 U.S. 100.
Omaha Water Company vs. Omaha, 147 Fed. 75; 77 C. C. A. 267.
Owensboro vs. Owensboro Water Works Company, 191 U.S. 358.

R

Robbins vs. Clark, 127 U.S. 622.
Rogers Park Water Co. vs. Fergus, 180 U.S. 624.

S

Selkirk vs. Sioux City Gas & Electric Company (Iowa), 176 N. W. 301.
Smythe vs. Ames, 169 U.S. 466.
Stanislaus County vs. San Joaquin C. & I. Company, 192 U.S. 201.

T

Thompson on Corporations, Vol. 3, Section 2765.
Tipton vs. Tipton Light & Heat Co., 176 Iowa, 224.
Town of Arkon vs. McElligott, 166 Iowa, 297.
Town of Williams vs. Iowa Falls Electric Company, 185 Iowa, 493.
Town of Woodward vs. Iowa Railway & Light Company, 178 N. W. 549.

W

Wilcox vs. Consolidated Gas Company, 212 U.S. 19.
Williams vs. Eggleston, 170 U.S. 304.
Williams vs. Gaylord, 186 U.S. 157.
Wilson vs. Rousseau, 4 How. 646.
Wright vs. Nagle, 101 U.S. 791.

Supreme Court of the United States

October Term, 1920.

No. 190.

MUSCATINE LIGHTING COMPANY,
Appellant,

vs.

CITY OF MUSCATINE, IOWA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

Nature of the Action and the Issues.

This is an appeal from a judgment dismissing an action for an injunction against the enforcement of an ordinance of the defendant city fixing the price of gas. The bill was predicated upon allegations showing that the rate fixed was so low as to fail to then yield plaintiff its actual necessary operating costs and that for a number of years plaintiff's average return therefrom upon the fair value of its property had been less than 4% per annum. The rate

was not fixed in the ordinance by which the Company's franchise was granted **but in a general ordinance devoted entirely to rate fixing passed some years after the granting of the franchise.** It was enacted by the city pursuant to its rate making power as conferred upon it by law (Sec. 725 Code 1897), and was purely a governmental act.

To this bill the defendant interposed an **amended and substituted** answer in two counts (Record 19). Count One thereof alleged that plaintiff was bound by contract to sedd gas within the City of Muscatine as long as its franchise ran at the rates fixed in the ordinance. This contention was predicated upon the allegation that the ordinance complained of was enacted as a substitute for a previous ordinance fixing a lower rate for gas (then the subject of litigation between the parties) and as the result **of a certain written proposal** filed with it by plaintiff. The allegations of the answer upon this point and are important and are as follows (Record 24):

> "The plaintiff was requested to reduce its proposition to writing, which was done and presented to the City Council at a special meeting called on the night of April 29th, 1914, for the purpose of consummating the deal as agreed upon. Agents of plaintiff were present at both of these meetings. * * *
>
> **"The written proposal of plaintiff, a copy of which is hereto attached, marked Exhibit 2 and by this reference made a part hereof, sets**

forth clearly the agreement as made by the parties. * * *

"That the agreement as reached on the afternoon of April 23rd, 1914, was fully and completely carried out by the City Council in strict compliance with the terms thereof as set forth in the said written proposal, (defendant's Exhibit 2), the cause of action above referred to was dismissed by the Muscatine Lighting Company, and the contract fully consummated between the parties, and has been fully complied with in all its terms and conditions by both parties ever since, until the commencement of this action on the part of complainant."

The Company denied that the proposal as submitted tended to show a purpose to contract as to rates—or could be construed as the basis of a contract fixing rates and denied the authority of the city to enter into such a contract.

It appearing to the trial court that if this issue were determined favorably to the city's contention there would be no occasion for examining the allegations as to the confiscatory character of the rate he directed that the action be assigned for trial upon this issue as raised by Count One of the Amended and Substituted Answer, to which the Complainant excepted. Record 43.

The action coming on for trial as ordered, formal concessions were made by the parties establishing the authenticity of the ordinances and docu-

ments which will be referred to in the statement of facts (Record 39) and an offer was made by the city of certain oral proof. Objections to this line of testimony were interposed and sustained and nothing material was thus adduced. (Record 40-41-42.)

It will thus be observed that the issues heard and determined by the trial court were two:

First: Was any contract fixing rates for the franchise term or any other term in fact attempted or intended to be made by the parties?

Second: Had the defendant city any authority whatever to enter into such a contract even though one had been intended?

STATEMENT OF FACTS.

The Proposal.

In view of the allegation of the Answer that "the written proposal of plaintiff, a copy of which is hereto attached, marked Exhibit 2 and by this reference made a part hereof **sets forth clearly the agreement as made by the parties,**" it is of the utmost importance that is be carefully examined and clearly analyzed. (First, it should be stated that these documents must all be read in the light of the following circumstances: Upon the 18th day of December, 1913, conceiving the rate for gas established in the ordinance granting complainant its franchise to be unduly high, the Council passed an ordinance repealing such rate and **fixing the price of gas** at

$1.00 per thousand. (See Record 32, Ex. 1.) An action was at once brought by the Company in the state courts to enjoin the enforcement of this ordinance on the ground that it was confiscatory and in this action a temporary injunction was granted. The Proposal was the outcome of negotiations looking toward a disposition of this litigation.) It appears in the Record upon page 33 and is as follows:

"To the Honorable Mayor and City Council of the City of Muscatine, Iowa.

Gentlemen:

Our attention has been called to the certain gas ordinance entitled:

"'An ordinance fixing the quality of illuminating gas and the price to be charged for same by any corporation, firm, partnership or person furnishing the same to consumers within the City of Muscatine, Iowa.'

And which was passed on its second reading by the City Council on the 23rd day of April, 1914, also,

That certain electric light ordinance entitled:

'An ordinance fixing the price to be charged for electrical energy for lighting by the Muscatine Lighting Company, to consumers in the City of Muscatine, Iowa,' passed on its second reading by the Council on the 23rd day of April, 1914:

Also, that the City on April 23rd, 1914, took proper action authorizing acceptance of the cer-

tain street lighting proposition submitted by the Muscatine Lighting Company to the City Council for consideration.

In consideration of the passing of these three matters by the City Council, and on condition that said ordinances are finally passed and the contract as proposed is entered into for the lighting of the streets, the Muscatine Lighting Company in addition to the granting and giving to the City of Muscatine, free of all charge, gas and electric light to the value of Five Hundred ($500.00) Dollars per annum as provided in section four (4) of an ordinance granting the Citizens' Railway and Light Company, its successors and assigns, the right to construct, operate and maintain gas, electric light, and power plants, and to use the streets, alleys and public places for the transmitting of same as passed March 17th, 1904, further agree to dismiss a certain suit now pending between the company and the City of Muscatine, wherein a temporary injunction has been granted and as a part of said agreement the company shall reimburse the City for all court costs, and attorneys' fees and all costs of publication relating to the dollar gas ordinance and the gas case, in connection with such litigation.

The Muscatine Lighting Company further agrees to enter into a suitable arrangement with the City so as to provide pole space on their poles for the attaching of fire-alarm and police-

call wires. The understanding being, that such installation shall be so arranged as not in any manner interfere with the uses by the company of its poles for its own services.

The Muscatine Lighting Company further agrees to furnish to the City free of charge, three series Tungsten lamps in Weed Park during the park season. To be placed as designated by the city.

The Company further agrees that arrangements will be made at once with the City whereby transfers will be issued to the passengers to and from the local cars in the City of Muscatine and the present interurban cars operating between Davenport and Muscatine. Such transfers to be issued under appropriate rules and regulations as to limitation of time and place as may be provided by the Company.

The Company further agrees that the monthly minimum bill in the electric lighting ordinance shall be reduced from seventy-five cents ($.75) to fifty cents ($.50).

The above conditions demanded by the City of Muscatine are agreed to with the understanding that the ordinances referred to will be passed upon their third and final hearing, in every respect the same as when approved by your honorable body on the 23rd day of April, 1914, with the exception of the reduction in the minimum charge for electric light from seventy-five cents ($.75) to fifty cents ($.50) and as oth-

erwise amended by insertion of "gross" in gas ordinance, section 2, and the proper execution of the City Street Lighting Contract.

Witness our hand and seal this 29th day of April, 1914. Muscatine Lighting Company,
by H. C. Blackwell."

The gas ordinance referred to is the one here attacked. The "certain suit" then pending between the Company and the City wherein a temporary injunction had been granted which was to be dismissed by the Company with reimbursement to the city for all court costs and attorney fees was the suit above mentioned. The other ordinance referred to was an ordinance reducing electric rates **below** those fixed in the ordinance granting the Company its electric franchise.

Analyzed and reduced to concise terms, the things where "were demanded by the City of Muscatine" and which the Company proposed and agreed to do were as follows:

First: To give to the City of Muscatine, free of all charge, gas and electric light to the value of $500.00 per annum.

Second: To dismiss a certain injunction suit pending between the Company and the City concerning the enforcement of the $1.00 gas ordinance and reimburse the City for all its court costs and attorney's fees and costs of publication relating thereto.

Third: To grant to the City upon the complainant's poles space for the attaching of fire alarm and police call wires.

Fourth: To furnish to the City free of charge three series tungsten lamps in Weed Park during the park season.

Fifth: To make arrangements whereby transfers would be issued to and from the local cars of the local street railway company and the interurban cars operating between Davenport and Muscatine. The local cars and interurban cars are operated by different corporations.

Sixth: To reduce the monthly minimum bill for electric light from 75 cents to 50 cents per month.

The things above set forth "demanded by the City of Muscatine," (as carefully recorded in the Proposal) were to be done by the Company in consideration of the execution of the street lighting contract between the Company and the City and passage of the two ordinances upon their third reading.

It will be observed that there was not included in the demands of the city as agreed to by the Company any provision that the Company should accept the rates fixed by the new ordinance in any other light than as set forth in the ordinance, to-wit: As rates fixed by governmental authority and therefore binding as long as conditions permitted the Company to operate thereunder but **not binding if conditions arose which made it impossible for the Company to render service thereunder** and earn a reasonable return upon the fair value of its property.

So important a matter as this certainly should not be read into an instrument by a court.

The Ordinance.

It is next essential that we turn to the ordinance itself. It is set forth in full as Exhibit "A" upon page 12 of the Record but for the convenience of the Court it is here reproduced:

Exhibit "A."

An Ordinance **Fixing** the Quality of Illuminating Gas and **the Price** to be Charged for the Same **by Any Corporation, Firm, Partnership, or Person Furnishing** the Same to Consumers Within the City of Muscatine, Iowa.

Be it Ordained by the City Council of the City of Muscatine:

Section I.

That any corporation, firm, partnership or person, or its successors or assigns, in supplying gas to the inhabitants of the City of Muscatine, Iowa, shall not charge to exceed One Dollar and Ten Cents ($1.10) per thousand cubic feet; providing, however, that said corporation, firm, partnership or person, may charge not to exceed One Dollar and Twenty Cents ($1.20) per thousand cubic feet of gas used by a consumer

who does not pay his bill for said gas by the tenth day of the month succeeding that in which said gas is furnished.

It is further provided that the charge of $1.10 per thousand cubic feet net shall be reduced at the rate of two cents (2c) per thousand cubic feet each year beginning May 1st, 1915, and continuing for a period of five years (5), or until the rate is $1.00 per thousand cubic feet net.

Section II.

The gas to be furnished by any corporation, firm, partnership or person to the inhabitants of the City of Muscatine, shall have an average gross heating value of Five Hundred and Ninety (590) British Thermal Units per cubic foot, with an allowable variation of ten per cent (10%) over or under this figure. The test to determine the heating value aforesaid to be made at the Company's works as the gas passes from such works into the distribution system. And that said test must be made whenever required by the City Council and the City shall have the right at any time to inspect and test said gas by a competent inspector appointed by the City.

Section III.

Be it further provided that said corporation, firm, partnership or person shall furnish

to its consumers for measuring the gas to be used, proper meters free of charge; and further provided that said corporation, firm, partnership or person shall be authorized to charge to its consumers a minimum monthly charge of fifty cents (50c) in those cases and instances where the consumer does not use in any one month, more than fifty cents' (50c) worth of gas computed on the scale of prices hereinbefore mentioned; and said charge of fifty cents (50c) shall include all meter charges.

Section VI.

It is further provided that in those cases where any consumer desires to close his premises for one month or more that said corporation, firm, partnership or person shall, upon written request from such consumer, remove the gas meter from such premises and reinstall the same upon written application by such consumer, without any charge for such removal or reinstallation, and that during the period such meter is thus removed there shall be no minimum monthly charge collected by said company.

Section V.

Any corporation, firm, partnership or person violating any of the provisions of this ordinance, shall, upon conviction thereof, be pun-

ished by a fine of not less than Ten Dollars ($10.00) or more than One Hundred Dollars ($100.00).

Section IV.

This ordinance shall be effective for gas furnished from any after May 1st, 1914.

Section VII.

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Passed and approved this 29th day of April, 1914.

Harry Kern,
Mayor of the City of Muscatine.

Attest:
H. B. Caple, City Recorder.

It is clear that **the ordinance is in form a governmental act** applicable to and governing any persons natural or artificial who shall vend gas within the city; that it carries appropriate penalties for its violation and **requires the assent of no one** as a prerequisite to its validity or enforcement. It is in fact an act of government fixing the price of gas pursuant to the governmental power possessed by the city. There is not an intimation in it that it shall under any circumstances be considered as a contract or in any other light than as a governmental regulation.

Reading the ordinance in the light of the proposal and the circumstances attending its passage, it is also perfectly clear that it was enacted as a sub-

stitute for the $1.00 ordinance and to end the litigation between the Company and the city by getting the rate above the point of confiscation. It is also clear that the city used the litigation and the attendant circumstances as a method of obtaining from the company certain favorable concessions in addition to those provided in the franchise ordinance. It is equally clear that it was not demanded that the Company agree to be bound by the new rate **as by contract** to the end of its franchise term. The city was expressly prohibited by law from binding itself by contract and **it would be an extraordinary demand under the circumstances to require the Company to assent to be bound as by contract to maintain a rate which the city might alter at will.**

The Decree of the Court.

The decree of the court was rendered upon the 15th day of August, 1919, and dismissed Plaintiff's Bill upon the following finding (Record 43):

> "That the rates complained of by the plaintiff were in fact fixed by contract of the parties, as alleged in count One of said answer, and that said rates are valid and binding upon the plaintiff, regardless of the claim in the plaintiff's petition that the same are confiscatory, and that in view of such contract rates, the facts stated in the Bill of Complaint and amendments thereto, entitle the plaintiff to no relief; such rates being fixed by a contract binding upon the plaintiff

and that for this reason the plaintiff is not entitled to any relief herein, and its Bill of Complaint is dismissed. The Plaintiff excepts."

Thereupon the Company asked that the temporary injunction be continued in force pending an appeal, and it appearing to the Court that the questions involved were sufficiently doubtful to warrant this relief an order was so made, establishing a rate of $1.55 per M pending this appeal. Thus this rate has been and is still being collected and the Company is under bond to make refunds in case the final judgment should so require. There is now a sum of approximately $34,000.00 in this fund.

SPECIFICATIONS OF ERROR

The Appellant alleges that the decree entered in this cause is erroneous and unjust to the Complainant and violates the principles of equity in this:

I.

Because the trial court erred in holding that the rate ordinance of the City of Muscatine, Iowa, passed under date of April 29th, 1914, and being Exhibit "A" of plaintiff's petition, did under the facts as shown in evidence constitute a contract between the City of Muscatine and the complainant, under which the complainant obligated itself to supply gas within said city during the unexpired term

of its franchise at the price therein fixed for the reason that under the undisputed evidence in the record, the said ordinance was purely a legislative enactment of the City of Muscatine passed pursuant to the rate making power delegated to it under the statutes of the State of Iowa, and particularly under Section 725 of the Code of Iowa 1897 as amended and was applicable generally within said city to all persons or corporations selling gas therein and carried penalties for its violation and was not accepted and was not in any respect contractual by the complainant Company.

II.

Because the City of Muscatine at the time of the passage of the rate ordinance of date April 29th, 1914, being Exhibit "A" Plaintiff's Bill, was forbidden by statute, to-wit: Section 725 of the Code of Iowa 1897 as amended to bind itself by a contract fixing any definite rate for any particular time.

III.

Because there is no testimony whatever to support the contention of the defendant and the finding of the Court that the said rate ordinance passed under date of April 29, 1914, being Exhibit "A" attached to plaintiff's Bill, constitute a contract but on the contrary the testimony conclusively shows that the said ordinance was adopted by the City of Muscatine as an ordinance fixing complainant's

rates of charge by law and not by contract and was so understood by this complainant and by the city at the time of its passage and adoption.

IV.

Because the written proposal of the complainant Company under date of April 29, 1914, which is Exhibit "2" attached to defendant's amended and substituted Answer, clearly sets forth in express terms the proposal made by the complainant Company, and the acceptance of such proposal by the defendant city and the said complainant Company was not bound beyond the terms thereof. That under said proposal and the acceptance thereof, there is to be found no agreement whatever upon the part of the complainant that said rate ordinance should be considered in any other manner than as a legislative act of the city, which it would be the duty of the city to amend or repeal at any time that conditions had so changed as to render the rate named therein confiscatory.

V.

Because under the statutes of the State of Iowa, to-wit, Section 725 of the Code of Iowa 1897, the dedefendant city at the time of the passage of said ordinance had not and has not now power or authority to fix the rates of charge of the complainant Company by contract but on the contrary had been delegated and did possess and does now possess full and

complete power to fix such rates by legislative act and its action in the fixing of the complainant's rates by said rate ordinance must be held to have been pursuant to and in the exercise of the legislative power expressly conferred upon it under the statutes of the State of Iowa.

VI.

Because the complainant and the City of Muscatine, Iowa, defendant, were forbidden by the statutes of the State of Iowa, to-wit: Section 725 Code of Iowa 1897, as amended, from entering into any contract binding upon them fixing specifically rates for any definite time.

VII.

Because the District Court of the United States in and for the Southern District of Iowa, Davenport Division, being the trial court, declined and refused to hear the evidence in the case upon all allegations of the Bill of Complaint, and split the plaintiff's cause of action, trying only the issue raised by the first count of defendant's Answer, viz:

The question of whether the ordinance of the City of Muscatine of date April 29th, 1924, was in fact and in law a contract between the said City of Muscatine and the plaintiff Company; thus rendering it impossible for complainant to present its evidence as to the merits of the entire controversy and have the same incorporated as a part of the record of this case upon its appeal.

VIII.

Because the trial court in splitting plaintiff's cause of action and hearing only the issue presented by the first count of defendant's Answer required this plaintiff in order to have the merits of its case passed upon to try another action between it and the defendants when the whole case should have been heard and determined in a single action.

BRIEF OF ARGUMENT.

Regulation by Law and Establishment by Contract.

Regulation of rates as a governmental function and establishment of rates by contract between the utility and the city are quite different things.

Omaha Water Co. v. Omaha, 147 Fed 75, 77 C. C. A. 267, 12 L. R. A. N. S. 736.

Noblesville vs. Noblesville Gas & Light Company, 157 Ind. 162; 60 N. E. 1032.

McQuillin Municipal Corporations, Sec. 1733; Vol. IV; 3699.

Rates fixed by law are always subject to attack if they are so low as to make it impossible for the utility to earn a fair return thereunder upon the fair value of the property it has devoted to the public service.

Smythe vs. Ames, 169 U. S., 466.

Denver vs. Denver Union Water Company, 246 U. S. 178.

Wilcox vs. Consolidated Gas Co., 212 U. S. 19; 52.

Des Moines Gas Co. vs. Des Moines, 238 U. S. 153.

Cedar Rapids Gas Co. vs. Cedar Rapids, 223 U. S. 655.

Rates established by valid contracts between utilities and cities are not subject to attack even though the rate may fail to yield the utility a return upon its property. This is because the courts are powerless to relieve persons from the obligations of contracts voluntarily entered into.

Columbus Railway Power & Light Co. vs. City of Columbus et al., 249 U. S. 399.

Neither is a city permitted to repeal or avoid a rate established by valid contract even though the rate is yielding more than a fair rate of return upon the property of the utility.

Detroit vs. Detroit C. Ry. Co., 184 U. S. 368.

Cleveland vs. Cleveland City Ry. Co., 194 U. S. 519.

Minneapolis vs. Minneapolis St. Ry. Co., 215 U. S. 417.

There can be no such thing as an effective agreement to be bound by the exercise of governmental power by a municipality. An ordinance if valid is binding upon all citizens, whether they agree to be

bound by its terms or not. The obligation it imposes is in no way altered or affected by the spirit in which it is accepted by the members of the community. The acquiescence of the plaintiff appellant (Record p. 33, Exhibit 2) amounts to nothing more than its recognition of the terms of the proposed ordinance.

Iowa Cities and Towns are Empowered to Regulate by Law and Denied Authority to Establish by Contract.

In Iowa, cities and towns are expressly forbidden to contract as to rates of charge for water, gas, or electric servive, by Section 725 Code of 1897, which was in force at the time of the adoption of the ordinance herein attacked, and is still in force. It is as follows:

> "Sec. 725. Regulation of rates and service. They shall have power **to require every individual or private corporation** operating such works or plant, subject to reasonable rules and regulations, **to furnish any person applying therefor,** along the line of its pipes, mains, wires, or other conduits, **with gas, heat, water, light or power,** and to supply said city or town with water for fire protection, and with gas, heat, water, light or power for other necessary public purposes, and **to regulate and fix the rent or rate** for water, gas, heat, light or power; **to regulate and fix the** charges for water meters, gas meters, electric light or power meters, or other device or means

necessary for determining the consumption of water, gas, heat, electric light or power, **and these powers shall not be abridged by ordinance, resolution or contract.''**

This Section has been many times construed by the Supreme Court of Iowa as delegating to cities only the **governmental** power to **fix** rates, and all rates fixed by cities and towns **whether in franchise ordinances or in subsequent ordinances** as in the case at bar, have been held subject to attack on the ground of unreasonableness or confiscation.

Town of Woodward vs. Iowa Ry. & Light Co., 178 N. W. 549, July 6, 1920.

Town of Williams vs. Iowa Falls Electric Co., 185 Iowa 493.

See also:

Selkirk vs. Sioux City Gas & Electric Co., 176 N. W. 301.

Iowa Ry. & Light Co. vs. Jones Auto Co., 182 Iowa 982.

Tipton vs. Tipton Light & Heating Co., 176 Iowa 224.

Cedar Rapids Gas Co. vs. City of Cedar Rapids, 144 Iowa 426.

In the Woodward case above cited, the Electric Company accepted a 25 year franchise in June, 1913. Section 6 of the ordinance by which the franchise was granted specified certain maximum rates which might be charged to consumers. In 1918 the Com-

pany declared its inability to further furnish service at the rates named in the franchise ordinance and charged that such rates had become unreasonable and confiscatory. The town refusing to grant an increase, the Company threatened to discontinue its service. The town then brought the action to enjoin the Company from breaching its alleged contract. The Court held:

1. That all the rights of regulation conferred by Section 725 were governmental and must be so exercised.

2. That it was clear from the statute and its progressive development as shown by a historical review of the preceding acts that cities and towns in Iowa were not authorized to establish rates by contract and had no authority to **establish** unreasonable rates—or to **maintain** rates once reasonble after they became unreasonable or confiscatory in character by reason of changed conditions.

3. That the subject had been fully covered in the Court's preceding decisions.

It therefore affirmed the action of the Trial Court in holding the rates both unreasonable and confiscatory and denying the relief prayed for by the town.

In announcing its opinion, the Court said:

> "The contention that the presumption of reasonable rates continues until new ordinance rates are adopted cannot be sustained. To sustain such contention would be to hold that the utility corporation has no remedy, whatever the

facts might be, if the city council refused to amend the rates. The constitutionality of the ordinance rates, like the constitutionality of a statute, is always open to challenge. **Indeed, the only power conferred by the Legislature upon the city council is the power to establish reasonable rates and not unreasonable ones. To enact unreasonable rates, therefore, is to exceed, not only its constitutional power, but its statutory power as well.** Without dwelling further upon the details of the argument, it is enough to say that the ground herein covered has been fully covered in our previous cases. Cedar Rapids Gas Co. v. City of Cedar Rapids, 144 Iowa, 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025, 138 Am. St. Rep. 299; Tipton v. Tipton Light & Heating Co., 176 Iowa, 224, 157 N. W. 844; Iowa Railway & Light Co. v. Jones Auto Co., 182 Iowa, 982, 164 N. W. 780; Selkirk v. Sioux City Gas & Electric Co., 176 N. W. 301."

This statute of Iowa is unique insofar as our researches go and its prototype is not found in the legislation of any other State. In effect, it establishes complete "home rule" of utilities by cities and incorporated towns however small. Each council is in effect a utilities commission within its own limited territorial sphere with power to compel and regulate service and to fix and regulate rates of charge. Possessing these broad powers these bodies must exercise them. The welfare of both the consumers and

the utilities demands this. As ratemaking bodies, they can no more absolve themselves from the exercise of their important duties by making so-called contracts with utilities than could a state-wide public utilities commission. This is in effect the holding of the Supreme Court of Iowa.

The Decision of the Supreme Court of Iowa Construing the State Statutes Defining the Powers and Duties of Its Municipal Corporations is Considered as Final by This Court.

This rule announced in a series of cases by the Supreme Court of Iowa in the construction of its own peculiar statute and after a full and mature consideration of its development and historical growth will be considered by the Federal Courts as establishing the law of the State and as of binding force and effect upon them. The rule has perhaps never been better stated than by Chief Justice Marshall in the early case of Elmensdorf vs. Taylor, 10 Wheat. 152. He said:

> "This Court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe which

> professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France or of any other nation had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

This rule is peculiarly applicable in the case of decisions of the state courts defining the rights, powers, duties and liabilities of its municipal subdivisions. This Court in the early case of Claiborne County vs. Brooks, 111 U. S. 400, 410, said:

> **"It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall pos-**

sess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

Williams vs. Eggleston, 170 U. S. 304, 311.

Ennis Waterworks vs. Ennis, 233 U. S. 652.

Crowley vs. Christensen, 137 U. S. 86:92.

Detroit vs. Osborn, 135 U. S. 492:499.

Balkam vs. Woodstock Iron Co., 154 U. S. 177, 188.

Equitable Life Assurance Society vs. Brown, 213 U. S. 25:43.

Fifth Avenue Coach Co. vs. New York, 221 U. S. 467:481.

Old Colony Trust Co. vs. Omaha, 230 U. S. 100: 112.

Williams vs. Gaylord, 186 U. S. 157:167.

Hartford Insurance Company vs. Chicago, etc., Railway Company, 175 U. S. 91, 100.

B. & O. Railway vs. Baugh, 149 U. S. 368:374.

Memphis Street Railway Company vs. Moore, 243 U. S. 229:300.

Norton vs. Shelby County, 118 U. S. 425:441.

Iowa Rule is in Harmony with Decisions of This Court.

The language of Section 725 above quoted does not purport to convey the right to contract. This is

true even though the words "and these powers shall not be abridged by ordinance, resolution or contract" be entirely disregarded.

Home Telephone Company vs. Los Angeles, 211 U. S. 265.

Rogers Park vs. Fergus, 180 U. S. 624.

Knoxville Gas Co. vs. Knoxville, C. C. A. Sixth Circuit, 261 Fed. 283.

In the case of Home Telephone Co. vs. Los Angeles, 211 U. S. 264, 272, in considering the right of the city of Los Angeles to establish telephone rates by contract this Court said:

> "It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 382; Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 508. But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear.

and all doubts must be resolved in favor of the continuance of the power."

After announcing the above rule the Court took up the specific provisions of the Los Angeles charter relied upon in support of its claim of power to contract. It read as follows:

"by ordinance * * * to regulate telephone service and the use of telephones within the city * * * and to fix and determine the charges for telephones and telephone service and connections."

In denying that this language was authority for a rate contract the Court said:

"This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, **but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement.** Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' **It authorizes the exercise of the governmental power and nothing else.**"

See also:

Rogers Park Water Co. vs. Fergus, 180 U.S. 642.

Freeport Water Co. vs. Freeport City, 180 U.S. 587-599-611.

Danville Water Co. vs. Danville City, 180 U.S. 619.

Owensboro vs. Owensboro Water Works Co., 191 U.S. 358.

Stanislaus County vs. San Joaquin C. & I. Co., 192 U.S. 201.

A Contract Beyond the Corporate Power of Either Party is Invalid.

"To make a valid contract it is necessary to show that both parties are competent to enter into the proposed stipulations. It is a fundamental principle in the law of contracts that to make a valid agreement there must be a meeting of minds, and, obviously, if there be a disability on the part of either party to enter into the proposed contract, there can be no valid agrement. * * * **A contract beyond the corporate power of either party is as invalid as if beyond the corporate powers of both.**"

Louisville & Nashville Railroad Company vs. Kentucky, 161 U. S. 67; 691-692.

Central Transportation Company vs. Pullman Car Company, 139 U. S. 48-60.

McCormick vs. Market Bank, 165 U. S. 538, 549. 550, 551.

California Bank vs. Kennedy, 167 U. S. 362, 367.
Concord First National Bank vs. Hawkins, 174 U. S. 364, 369, 370.
O'Brien vs. Wheelock, 184 U. S. 450, 490.
Thompson on Corporations, Volume 3, Title 20, Section 2765, page 2868.

No Contract Fixing Rates Unalterably and for a Fixed Time was in Fact Made.

The contract, if any, must be found in the written proposal of the Company; the ordinance passed by the city; or in both. There is not a word in any of these documents which in any way attempts to bind either party to the rates fixed in the ordinance for any specific length of time. There is nothing in the instruments to indicate that the city intended to be bound never to reduce the rates fixed by the ordinance **nor is there anything in the instruments to indicate that the Company was to be bound thereby more than by any other governmental act: viz, as long as the rates remained non-confiscatory.**

Proposal, see page 5 hereof, Record 33.
Ordinance, see page 10 hereof, Record 12.
Amended and Substituted Answer, setting up Contract, see page 2 hereof, Record 24.

There is not a word in any of these documents which indicates in any way an intention **to contract as to rates** or to fix them for any **specific length of time.** It is true that the city repealed the $1.00 rate

and enacted the new rate in lieu thereof. It is true that in consideration thereof the Company agreed to pay the costs of the litigation and comply with some other demands made by the city. **It is not true that either party said or did** anything from which the conclusion may be fairly drawn that the rate ordinance was to be considered in any other light than as a governmental or ploice regulation repealable by the city and binding upon the Company at all times unless it could establish that the rates therein fixed were or had become confiscatory.

The Company should not be bound beyond the terms of its written proposal.

Minneapolis & St. Louis Ry. Co. vs. Columbus Rolling Mill, 119 U. S. 149; 151.
Lilley vs. Chicago, 103 U. S. 155.
Kelely Mans Co. vs. Sibley, 137 Fed. 586; 588.
Hawkins vs. Young, 174 Iowa 383; 389.

The things which were **"demanded by the city of Muscatine"** and agreed to by the Company were as follows:

First: To give to the City of Muscatine free of all charge, gas and electric light to the value of $500.00 per annum.

Second: To dismiss a certain injunction suit pending between the Company and the City concerning the enforcement of the $1.00 gas ordinance and reimburse the City for all its court costs and attorney's fees and costs of publication relating thereto.

Third: To grant to the City upon the complain-

ant's police space for the attaching of fire alarm and police call wires.

Fourth: To furnish to the city free of charge three series tungsten lamps in Weed Park during the park season.

Fifth: To make arrangements whereby transfers would be issued to and from the local cars of the local street railway company and the interurban cars operating between Davenport and Muscatine. The local cars and interurban cars are both operated by a separate corporation.

Sixth: To reduce the monthly minimum bill for electric light from 75 cents to 50 cents per month.

A city will not be held to have renounced its right of rate regulation except upon the clearest evidence both as to its authority and its intention so to do. Neither should a utility be held to have contracted to sell gas for a specific price for a long period of years except upon clear proof of its intention so to do—especially in view of the fact that the city was prohibited by law from binding itself by such a contract.

Courts have no power to change a contract, or to make agreements for parties.

Robbins vs. Clark, 127 U. S. 622.
Baltger vs. Raleigh Air Line Ry. Co., 115 U. S. 634.
Morgan County vs. Allen, 103 U. S. 498.

Parties making contracts are presumed to have acted with reference to existing law.

Wilson vs. Rousseau, 4 How. 646.
Bronson vs. Krugie, 1 How. 311.
Connecticut Mutual L. Co. vs. Cushman, 108 U. S. 51.
Bulkley vs. U. S., 19 Wall 37.

The entire trancation herein from the first move of the city in the enactment of the $1.00 gas ordinance is entirely inconsistent with the present claim of the city that the rates were fixed by contract. The $1.00 ordinance was purely a governmental act and was enjoined as such; the new ordinance was similar in form; enacted pursuant to the same statutory authority; contained suitable penalties; required no acceptance or consent; was of general application. It was enacted as a substitute for the one in litigation and the Company's sole connection therewith as shown by its proposal was to yield to certain additional demands of the city. Certainly it was proper for the parties to treat together for the disposition of this litigation and the fixing of a compensatory rate under existing conditions without the Company being forever after bound by the rate thereby established regadless of new conditions rendering the once compensatory rate non-compensatory and confiscatory. Even in adjudicated cases involving rate ordinances decrees either sustaining or denouncing the rate are always regarded without prejudice to the continuing rights of the parties to renew the action under changed conditions:

Lincoln Gas & Electric Light Co. vs. Lincoln, 250 U. S. 256; 268.

Wilcox vs. Consolidated Gas Co., 212 U. S. 19.

Cedar Rapids Gas Co. vs. Cedar Rapids, 223 U. S. 655.

Des Moines Gas Co. vs. Des Moines, 238 U. S. 153.

Missouri vs. Chicago, Burlington & Quincy R. R., 241 U. S. 533; 539.

ARGUMENT.

In a case quite analogous to this, though the claim was there made by the company that it possessed **contract rights** to continue **high rates**, while here the claim is made by the city that it possesses **contract rights** to enforce **low rates**, this Court said:

> "Two questions obviously arise here. Did the City Council have the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service and disabling itself from exercising the charter power of regulation? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city."

Home Telephone Co. vs. Los Angeles, 211 U. S. 265; 272.

We have therefore deemed it proper to lay out this argument upon the groundwork so suggested and to first consider the power of the city to enter into a contract fixing these rates.

Had the City Any Power to Enter Into the Alleged Contract?

This question is fairly answered by the statutes of Iowa, Section 725 Code of 1897 reading as follows:

> "Sec. 725. **Regulation** of rates and service. They shall have power **to require every individual or private corporation** operating such works or plant, subject to reasonable rules and regulations, **to furnish any person applying therefor**, along the line of its pipes, mains, wires, or other conduits, **with gas, heat, water, light or power**, and to supply said city or town with water for fire protection, and with gas, heat, water, light or power for other necessary public purposes, and **to regulate and fix the rent or rate** for water, gas, heat and electric light or power; to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, **and these powers shall not be abridged by ordinance, resolution or contract.**"

It is fairly answered in a series of decisions by the Supreme Court of Iowa of which that in Town of

Woodward vs. Iowa Railway & Light Company, decided on July 6, 1920, 178 N. W. 549, is the latest. It is fairly answered in a series of decisions of this Court of which the Home Telephone Co. vs. Los Angeles, 211 U. S. 265, is one bearing a close analogy to the case at bar in which the rule is announced that a charter provision granting power "by ordinance * * * to regulate telephone service and the use of telephones within the city * * * **and to fix and determine the charges for telephones and telephone service and connections**" is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, **but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement.** Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance "to fix and determine the charges." **It authorizes the exercise of the governmental power and nothing else.**

It is fairly answered by the application of the universal rule, followed both by this Court and the Supreme Court of Iowa, so well announced by Judge Dillon in his work on Municipal Corporations, which reads as follows:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others:

First: Those granted in express words.

Second: Those necessarily or fairly implied in or incident to the powers expressly granted.

Third: Those essential to the declared objects and purposes of the corporations not simply convenient but indispensable. Any fair reasonable doubt concerning the existence of power is resolved by the Courts against the corporation and the power is denied."

Dillon Municipal Corporations, Fourth Edition, Section 89.

Citizens St. Railway vs. Detroit Ry., 171 U. S. 48; 53.

Minturn & Larue, 23 How 435.

Wright vs. Nagle, 101 U. S. 791.

Grand Rapids Electric Light & Power Co. vs. Grand Rapids, C. C. A. 33 Fed. 659.

Knoxville Gas Co. vs. Knoxville C. C. A. 261 Fed. 283.

Town of Arkon vs. McElligott, 166 Iowa, 297.

Heins vs. Lincoln, 103 Iowa 69; 77.

Applying the rule just stated to Section 725 which the Supreme Court of Iowa has always construed as expressly granting full power to fix and regulate rates as a governmental function, it is too obvious to require argument that power to contract

as to rates **is not indispensable.** On the contrary, as pointed out by the Supreme Court of Iowa in the Woodward case, and as many times suggested by this Court, such power is highly undesirable as it may result in rates either so high as to damage the public or so low as to damage or destroy the utility which is an instrumentality so essential to the public welfare as to be impressed with a public interest. Could any system of regulation be devised, more attractive to cities and towns than that established in Iowa under Section 725 of the Code of 1897? It is "home rule" in the highest degree. Under it, the complete power of rate and service regulation is delegated to the municipalities with no limitation whatsoever save that it shall be exercised reasonably. Certainly it is not unduly harsh for the legislature to insist that this power once possessed shall be fairly and courageously exercised for the public welfare? Yet this is all that has been requested of the defendant, which now seeks release from this duty by the claim that it has avoided its performance by contract.

A Contract Beyond the Corporate Powers of Either Party Thereto is Invalid.

No rule has been more consistently adhered to by this Court than that "**if there be a disability on the part of either party to enter into the proposed contract there can be no valid agreement.**"

In the Pullman case, the Court speaking through Mr. Justice Grey said:

> "The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful **and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds:** the obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. * * *"
>
> "It was argued in behalf of the plaintiff that, even if the contract sued on was void, because ultra vires and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period.

"But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court."

"The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

"A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it.

"The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities of its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the con-

tract, can be estopped, by assention to it, or by acting upon it, to show that it was prohibited by those laws."

Central Transp. Co. v. Pullman's Car Company, 139 U. S. Rep. 24-48-49-54-55-59-60.

This decision has been followed without variation by the Supreme Court of the United States.

The following cases are all from cases in which the Court was considering the question of ultra vires acts of corporations. In some of the cases your Honors will observe the question of ultra vires is raised by one corporation party as to itself, and in others as to the opposite corporation party.

"Besides this, however, in order to support the proposed consolidation of these two systems, the parties are bound to show, not only that the L. & N. Co. was competent to buy, but that the Chesapeake Co. was vested with power to sell. To make a valid contract it is necessary to show **that both parties are competent to enter into the proposed stipulations.** It is a fundamental principle of the law of contracts that, to make a valid agreement, there must be a meeting of minds, and, obviously, **if there be a disability on the party of either party to enter into the proposed contract there can be no valid agreement.** As was said by this court in St. Louis Railroad v. Terre Haute Railroad, 145 U. S. 393, 404: 'It is unnecessary, however, to express a definitive opinion upon the question whether a con-

tract between these partis was beyond the corporate powers of the plaintiff, because, as held by the decisions of this court already cited, **a contract beyond the corporate power of either party is as invalid as if beyond the corporate powers of both, and the contract in question was clearly beyond the corporate powers of the defendant.**' See also Thomas v. Railroad Co., 101 U. S. 71; Oregon Railway v. Oregonian Railway Co., 130 U. S. 1; Pennsylvania Railway v. St. Louis, Alton &c. Railway, 118 U. S. 290; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24."

Louisville & Nashville R'd. v. Kentucky, U. S. Vol. 161, 677, pgs. 691 and 692.

"The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers, **is unlawful and void, and will not support an action, resta, as this court has often recognized and affirmed,** upon three distinct grounds: the obligation of any one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. Pearce v. Madison & Indianapolis Railroad, 21 How. 441; Pittsburgh &c. Railway v. Keokuk & Hamilton Bridge Co.,

131 U. S. 371, 384; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 48.

"When the corporation is created by a charter granted by the legislature, any person dealing with it is bound to take notice of the terms of the charter, and of the general laws restricting or defining the powers of the corporation. Pearce v. Madison & Indianapolis Railroad, above cited; Zabriskie v. Cleveland &c. Railroad, 23 How. 381, 398; Thomas v. Railroad Co., 101 U. S. 71; Pennsylvania Railroad v. St. Louis &c. Railroad, 118 U. S. 290, 630. In like manner, when the corporation is formed under general laws, by the recording or filing in a public office of the required articles of association and certificate, any person dealing with the association is bound to take notice of the documents recorded or filed, upon which, as authorized and controlled by the general laws, depend the existence of the corporation, the extent of its corporate powers, and its capacity to act as a corporation. Oregon Railway v. Oregonian Railway, 130 U. S. 1, 25; Central Transportation Co. v. Pullman's Car Co., above cited.

"It is settled by a long series of decisions of this court, that a lease of a railroad by one railroad corporation to another, **which is beyond the corporate powers of either, is unlawful and void, and cannot be made good by ratification or estoppel,** so as to sustain an action upon the lease; that this is so, not only when the lease is

ultra vires of the lessor, corporation, and therefore open to the objection of disabling it from performing those duties to the public, its performance of which was the consideration upon which it received its charter from the state; but even if the lease is ultra vires of the lessee corporation only, and therefore not open to that particular objection. Thomas v. Railroad Co., of Pennsylvania Railroad v. St. Louis &c. Railroad, Oregon Railway v. Oregonian Railway, and Central Transportation Co. v. Pullman's Car Co., above cited. St. Louis &c. Railroad v. Terre Haute & Indianapolis Ry., 145 U. S. 393-404."

McCormick v. Market Bank, U. S. Rep. Vol. 165, 538, pages 549 and 550 and 551.

"Whatever divergency of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the invalidity of an act which is an ultra vires act. The cases of Thomas v. Railroad Company, 101 U. S. 71; Pennsylvania Railroad v. St. Louis, Alton &c. Railroad, 118 U. S. 290; Oregon Railway & Navigation Co. v. Oregonian Railway Co., 130 U. S. 1; Pittsburgh, Cincinnati &c. Railway v. Keokuk & Hamilton Bridge Co., 131 U. S. 371; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24; St. Louis &c. Railroad v. Terre Haute & Indianapolis Railroad, 145 U. S. 393;

Union Pacific Railway v. Chicago &c. Railway, 163 U. S. 564, and McCormick v. Market Nat. Bank, 165 U. S. 538, recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute."

California Bank v. Kennedy, U. S. Vol. 167, 362, pg. 367.

"The remaining question for our determination is whether the First National Bank of Concord, having, as a matter of fact, but without authority of law, purchased and held as an investment shares of stock in the Indianapolis National Bank, can protect itself from a suit by the receiver of the latter brought to enforce the stockholders' liability, arising under an assessment by the Comptroller of the Currency, by alleging the unlawfulness of its own action.

"This question has been so recently answered by decisions of this court that it will be sufficient for our present purpose, to cite those decisions without undertaking to fortify the reasoning and conclusions therein reached."

Citing and quoting from Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24; California Bank v. Kennedy, 167 U. S. 362, 367; McCormick v. Market National Bank, 165 U. S. 538.

Concord First National Bank v. Hawkins, U. S. 174, 364, 369 and 370.

"Even in the instance of contracts of a corporation beyond the scope of its corporate

powers, the law is well settled in this court that nothing which has been done under them or the action of the courts can infuse any vitality into them. Central Transportation Company v. Pullman Company, 139 U. S. 24."

O'Brien v. Wheelock, U. S. Vol. 184, 430 at page 490.

"Sec. 2768—Strict Doctrine of Ultra Vires. By the strict doctrine of ultra vires is meant that a corporation is not liable upon a contract beyond the powers conferred upon it by the legislature and varying from the objects of its creation as declared in the law of its organization. **This doctrine is administered by the supreme court of the United States, the courts of England and by many courts of last resort in the United States.** Under this rule a corporate contract which is 'ultra vires,' in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no lgal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. **No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.**" General Principles, Ultra Vires. Thompson on

Corporations, Vol. 3, Title Twenty, 2765, page 2868.

The Decisions of the Supreme Court of Iowa Defining the Powers of Municipal Corporations are Considered Final by This Court.

A City is a political subdivision of the State, created for the convenient administration of the government, with powers more or less enlarged, according to the requirements of the public, which may be increased or repealed at the will of the legislature. So far as they are invested with subordinate legislative power for local purposes, they are the mere instrumentalities of the State.

Jefferson City Gas Light Co. v. Clark, 95 U. S. 644.
Meriweather v. Garrett, 102 U. S. 472.
Mobile v. Watson, 116 U. S. 289.
Hill v. Memphis, 134 U. S. 198.

It is a fundamental rule of this Court as announced in Claiborne County vs. Brooks, 111 U. S. 400, 410, that "It is undoubtedly a question of local policy with each State what shall be the extent and character of the powers which its various political and municipal organizations shall possess, **and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States.**"

In many other important decisions are to be found the approval of this rule. From some we shall quote. In the case of Williams vs. Eggleston, 170 U. S., 304, 311, this Court said:

> "When the state court decides that municipal corporations within the territorial limits of the State are subject to the control of the state legislature, and that its act in creating for certain purposes a new corporation, and merging therein five separate towns, was valid, this court cannot hold that the state court was mistaken in its construction of the state constitution or in its declaration as to the extent of the power of the legislature over municipal corporations."

In the case of Ennis Waterworks vs. Ennis, 233 U. S. 652, this Court had before it for consideration, a municipal ordinance of the City of Ennis from which it was contended a certain contract arose. In stating htat the Court should give to the ordinance the interpretation placed upon it by the Supreme Court of Texas, this Court said:

> "This is clearly the case since the doctrine which the premise embodies is subject to this qualification that where a contract which is relied upon arises from a state law or municipal ordinance having the effect of such law, in interpreting for itself such law or ordinance this court will not give to it a meaning in conflict with the settled rule of the State at the time the

law was enacted or the ordinance adopted. In other words, that where we come to consider a contract arising from a state law or ordinance we will treat it as if there was embodied in its text the settled rule of law which existed in the State at the time the state action relied upon as a contract was taken. Burgess v. Seligman, 107 U. S. 20; Warburton v. White, 176 U. S. 484; Gulf & Ship Island R. R. v. Hewes, 183 U. S. 66; Freeport Water Co. v. Freeport, 180 U. S. 587; Great Southern Hotel Co. v. Jones, 193 U. S. 532, 548."

In the case of Crowley vs. Christensen, 137 U. S. 86, 92, this Court said:

"The Constitution of California vests in the municipality of the city and county of San Francisco the right to make 'all such local, police, sanitary and other regulations as are not in conflict with general laws.' The Supreme Court of the State has decided that the ordinance in question, under which the petitioner was arrested and is held in custody, was thus authorized and is valid. That decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it."

In the case of Detroit vs. Osborn, 135 U. S. 492, page 499, the Court said:

"What was there decided in reference to the powers is equally true as to the liabilities of

a municipal corporation. The City of Detroit, in the discharge of its public duty in respect to keeping the streets and sidewalks in repair, is under no higher or different obligation to a citizen of Ohio than to one of the State of Michigan and the measure of its liability under the statutes, as stated, is to be determined by the judgment of the Supreme Court of that State, and not by what our opinions might be as to the proper construction of those statutes. Reference may also be made to the recent case of Bucher v. Railroad Company, 125 U. S. 555, 584, in which this court followed, against its own judgment of the law, the rulings of the Supreme Court of Massachusetts, and held that a party traveling on Sunday, and not for necessity or charity, in the cars of a railroad company, could not recover for injuries sustained by the negligence of the company, because he was himself thus violating the law of the State. Concluding the opinion of the court in that case, it is observed: 'It may be said generally that whenever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts.' "

In the later case of Balkan vs. Woodstock Iron Company, 154 U. S. 177, 188, the Court said:

> "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute and is as binding upon the courts of the United States as the text."

See also:

Equitable Life Assurance Society vs. Brown, 213 U. S. 25, 43.

Fifth Avenue Coach Co. vs. New York, 221 U. S. 467, 481.

To quote further would be superfluous. The Supreme Court of Iowa has constantly announced and adhered to the doctrine that the power conferred by Section 725 is governmental, and that only; that cities and towns have no authority whatever to contract as to rates; and no power to fix or maintain unreasonable rates. Its last word upon the subject in Town of Woodward vs. Iowa Railway & Light Company admits of no further argument.

The Claim That There Was an Attempt to Fix Rates by Contract is Not Warranted.

The contract herein relied upon is in writing. In Count I of its verified amended and substituted answer (the case was tried upon Count I alone, Record 43) it is alleged that

"The written proposal of Plaintiff, a copy of which is hereto attached, marked Exhibit 2 and by this reference made a part hereof, **sets forth clearly the agreement as made by the parties.**"

It is contended that out of the proposal and the adoption of the gas ordinance arose a contract upon the part of the company to manufacture and sell gas during the remainder of its franchise term (fifteen years) at the rates named in the ordinance.

It is also alleged that the instruments "constitute one legal, binding contract **and both parties are bound thereby.**" An analysis of these instruments at once discloses the fatal weakness of the claim thus advance by defendant.

Let us examine these written instruments as they stand, in the light of the surrounding circumstances. The city had enacted a rate fixing ordinance repealing the rate provisions contained in the franchise ordinance and fixing the gas rates at $1.00 per thousand cubic feet. This ordinance was under attack in the courts as being unconstitutional. Negotiations were under way for a disposition of this litigation. The city then enacted the ordinance now in question, which still effected a substantial reduction in the franchise rates. In return for this it made certain demands of the Company to which the Company submitted.

All these demands are set forth in writing.

There is not one of them to which the claim that defendant agreed to be bound **by contract** to the new

rates for the remainder of the franchise term is in the slightest degree referrable.

There is not an intimation in the ordinance that it was considered as contractual or as requiring the assent of anyone as to its validity. It does not refer to the proposal, nor to the Company save as it belonged to the general classes of persons enumerated therein. While the immediate rate reduction was not so great as under the first ordinance it was still substantial and in addition thereto the Company felt compelled to yield to the additional demands enumerated in the proposal. Certainly had the parties intended the execution of so important a **contract as one fixing gas rates** for fifteen years something would have been said about it in these instruments.

Why Say the Contract Period is Fifteen Years?

But why is it said the rate was to continue for 15 years or until the end of the franchise term? **Nothing whatever is to be found in the proposal or ordinance fixing a time during which this rate was to remain effective.** The documents are absolutely silent upon this important matter and defendant may as well urge the contract as being perpetual as being limited to the franchise period.

How long was the rate fixed in the ordinance to remain in force? Obviously until changed by the legislative authorities of the city or set aside by a court of competent jurisdiction as unreasonable and confiscatory. In other words, the ordinance speaks for itself as a purely legislative enactment. Was it not the duty of the Company to confer with the city

in reference to a settlement of the rate litigation? Was it not its duty to exhibit to the city its books of account, and advise with the city as to the rate required to produce essential revenues? Was it not its duty to accept and try out such reasonable rate as might give promise of proving compensatory? All these duties this Court has many times announced as resting upon utilities.

Lincoln Gas & Electric Light Co. vs. Lincoln, 250 U. S. 256, 268.
Wilcox vs. Consolidated Gas Co., 212 U. S. 19.
Cedar Rapids Gas Co. vs. Cedar Rapids, 223 U. S. 655.

For having done this and yielded to certain additional demands is it now to be held that the Company is forever bound **as by contract** to furnish gas at the rates fixed as reasonable under conditions prevailing in 1914?

And this in face of the fact that the city was not and could not be bound for an instant by the alleged contract.

The suggestion that the Company can be bound **beyond the terms of its proposal** and under the circumstances herein disclosed is contrary to equity and natural justice. We respectfully submit that there is nothing in this Record to warrant the claim that there was ever any intention of either party hereto to fix the rates set forth in the ordinance as by contract.

For the errors pointed out we respectfully submit that the decree should be reversed and the case remanded for trial upon the merits.

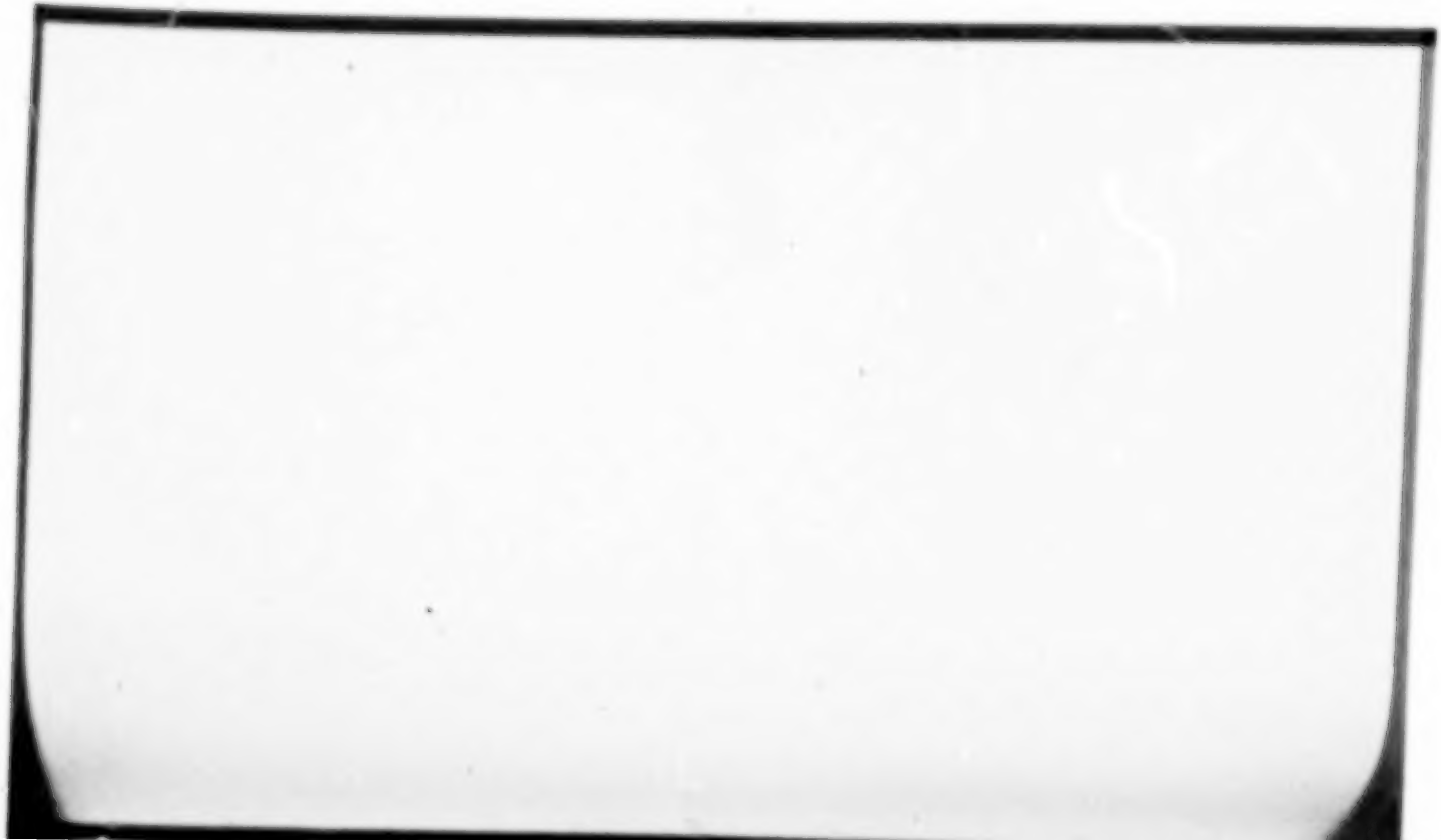
Respetfully submitted,

J. R. Lane

E. M. Warner

Wm. Chamberlain
Counsel for Appellant.

C. M. WATERMAN,
DON BARNES,
of Counsel.



SUPREME COURT OF THE UNITED STATES.

Nos. 180, 189, 190.—October Term, 1920.

180	Southern Iowa Electric Company, Appellant, *vs.* The City of Chariton, Iowa, et al.	Appeals from the District Court of the United States for the Southern District of Iowa.
189	Iowa Electric Company, Appellant, *vs.* City of Fairfield, Iowa, et al.	
190	Muscatine Lighting Company, Appellant, *vs.* City of Muscatine, Iowa, et al.	

[April 11, 1921.]

Mr. Chief Justice White delivered the opinion of the Court.

At the time these suits were begun the appellants were engaged in supplying electricity or gas to the municipal corporations who are the appellees. This service was being rendered by virtue of ordinances conferring franchises to use the city streets during 25 years in two of the cases and 20 years in the other. The ordinances contained a schedule of maximum rates. After they were in effect a few years the three suits which are before us were begun against the cities with the object of preventing the enforcement of the maximum rates specified in the ordinances, on the ground that such rates were so unreasonably low that their continued enforcement would deprive the corporations of remuneration for the services by them being performed and in fact, if enforced, would result in the confiscation of their property in violation of the due process clause of the 14th Amendment to the Constitution of the United States. In the three cases the court granted a temporary injunction restraining the enforcement of the

maximum rates and allowed an order permitting, pending the suits, a higher charge.

The cases were submitted upon the pleadings and without the taking of testimony upon issues which presented the contention, that the ordinances were contracts and therefore the maximum rates which they fixed were susceptible of continued enforcement against the corporations, although their operation would be confiscatory. In one opinion, applicable to the three cases, the court stated its reasons for maintaining this view, but directed attention to the fact that no proof had been offered concerning the confiscatory character of the rates, and pointing out that as such subject might become important on appeal, it would be necessary to restore the cases to the docket for proof in that regard unless the situation was remedied by agreement between the parties. Thereupon the pleadings were amended so as to directly present, separately from the other issues in the case, the right of the cities to enforce the ordinance rates in consequence of the contracts, without reference to whether such rates were in and of themselves confiscatory. Upon its opinion as to the existence of contracts and the power to make them as previously stated, the court entered decrees enforcing the ordinance rates which are now before us for review because of the constitutional question involved.

Two propositions are indisputable: (a) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations, *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 442; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 17; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41; *Minnesota Rate Cases*, 230 U. S. 352, 434; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 194; and (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a par-

ticular time, the enforcement of such rates is controlled by the obligation resulting from the contract and therefore the question of whether such rates are confiscatory becomes immaterial. *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 593; *Detroit* v. *Detroit City Ry. Co.*, 184 U. S. 368; *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437; *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 519; *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 273; *Minneapolis* v. *Minneapolis Street Ry. Co.*, 215 U. S. 417; *Columbus Ry. Power & Light Co.* v. *City of Columbus*, 249 U. S. 399.

It follows that as the rates here involved are conceded to be confiscatory they cannot be enforced unless they are secured by a contract obligation. The existence of a binding contract as to the rates upon which the lower court based its conclusion is, therefore, the single issue upon which the controversy depends. Its solution turns, first, upon the question of the power of the parties to contract on the subject, and second, if they had such power, whether they exercised it.

As to the first, assuming for the sake of the argument only, that the public service corporations had the contractual power, the issue is, Had the municipal corporations under the law of Iowa such authority? Its possession must have been conferred, if at all, by section 725 of the Iowa Code of 1897 which deals with that subject. That statute came before the Supreme Court of Iowa for consideration in the very recent case of *Town of Woodward* v. *Iowa Railway & Light Co.*, Ia. , 178 N. W. 549. That was a suit by the Town of Woodward to compel the Light Company to continue to furnish electric lighting at the rates fixed by the ordinance conferring upon the company its franchise to maintain and operate its plant in the town. The company resisted on the ground that the rates had become confiscatory and were not enforceable. Testimony offered by the company to establish the confiscatory character of the rates was objected to by the town, which asserted that the acceptance by the company of the ordinance bound it by contract to furnish the service at the rates therein prescribed whether or not they were confiscatory, and that the evidence offered was therefore immaterial. The evidence was received, subject to the objection, and the court, finding the rates to be confiscatory, sustained the company's contention and dismissed

the bill. Upon appeal by the town, the Supreme Court, affirming the action of the trial court, said:

"The defendant's franchise in the town of Woodward was granted in June, 1912, by ordinance duly enacted by the city council and duly approved by vote of the electors, as required by section 720 of the Code. Section 6 of the ordinance which granted the franchise specified the rates to be charged by the defendant to consumers. The term of the franchise was 25 years. The essence of the plaintiff's contention is that the enactment of this ordinance (including the franchise, and the rates and the approval of the same by the electors), and the practical acceptance of the same by the utility corporation, constituted a contract binding as such both upon the town and upon the utility corporation. The defendant resists this contention and likewise denies that there is any power conferred by statute upon the city council to enter into contract on the subject of rates. The issue at this point is the controlling one in the case. The question thus at issue is answered by section 725 of the Code of 1897, which provides as follows:

" 'Sec. 725. *Regulation of Rates and Service.*—They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, water, light or power, and to supply said city or town with water for fire protection, and with gas, water, light or power for other necessary public purposes, *[and to regulate and fix the rent or rates for water, gas, heat and electric light or power] . . . and these powers shall not be abridged by ordinance, resolution or contract.'

"It will be noted from the foregoing that the legislative power to fix rates is conferred by this section upon the city council. The legislative power thus conferred is a continuing one, and may not be abridged or bartered away by contract or otherwise. . . . There was a time in the history of our legislation when the right of contract as to rates was conferred by statute upon the city council. . . . By the revision and codification of 1897 the right of contract as to rates for utilities of this character was entirely eliminated, and the legislative power to regulate rates was conferred upon the city council in all cases. The reason for the change of method is obvious enough. Under the contract method, the rights of the public were often bartered away, either

*The words in brackets are found in the section, but are not embraced in the provisions quoted by the court, although as shown by the language of the court as to the rate provision they were early taken into view and applied in construing the statute.

ignorantly or corruptly, and utility corporations became empowered through the contractual obligations to enforce extortionate rates. The net result of the progressive legislation is found in our present section 725, whereby it is forbidden to any existing city council to bind the city to any rate for any future time. The power of regulating the rate is always in the present city council. It must be said, therefore, that the rates fixed by section 6 of the ordinance hereinbefore referred to, were not fixed by contract."

Indeed, the doctrine thus expounded was but a reiteration of the rule of the Iowa law laid down in previous cases. *City of Tipton* v. *Tipton Light & Heating Co.*, 176 Ia. 224; *Iowa Railway & Light Co.* v. *Jones Auto Co.*, 182 Ia. 982; *Town of Williams* v. *Iowa Falls Electric Co.*, Ia. , 170 N. W. 815. And again, more recently, in *Ottumwa Railway & Light Co.* v. *City of Ottumwa*, Ia. , 178 N. W. 905, the court referring to the *Town of Woodward* case and to the doctrine therein announced based upon the significance of section 725 of the Code of 1897, thus restated its former conclusion on that subject:

"That statute in positive terms forbids any abridgment of the right to regulate and fix charges of service corporations named in the statute, either by ordinance, resolution, or contract. No one would now contend, in the teeth of the statute prohibition, that there can be a valid contract fixing permanent rates. As to corporations named in that statute we have held repeatedly that there can be no contracting that rates fixed for service shall not be changed. See Tipton *v.* Light Co., 176 Iowa, 224, 157 N. W. 844; Selkirk *v.* Gas Co., 176 N. W. 301. And see San Antonio Co. *v.* City (D. C.) 257 Fed. 467. To like effect is Iowa Co. *v.* Jones, 182 Iowa 982, 164 N. W. 780. And in the last case it is held that the fixing of maximum rates in a franchise ordinance is therefore not a contract that such rates may not be changed before the time stated in such ordinance has lapsed, and that approval by the electors of rates in the franchise is merely an approval of the rates fixed by the franchise, as rates temporarily settled, with the understanding that the same might be changed either upward or downward."

The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively

demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the State is urged by municipal corporations whose every power depends upon the state law. *Covington* v. *Kentucky*, 173 U. S. 231, 241; *Worcester* v. *Worcester Street Ry. Co.*, 196 U. S. 539, 548; *Braxton County Court* v. *West Virginia*, 208 U. S. 192; *Englewood* v. *Denver & South Platte Ry. Co.*, 248 U. S. 294, 296; *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394, 399.

Decrees reversed and causes remanded for further proceedings in conformity with this opinion.

A true copy.

Test:

Clerk Supreme Court, U. S.